CASE NBR: [95100239] CFX STATUS: [DECIDED ]
SHORT TITLE: [Cincinnati Equality Fndn. ]
VERSUS [Cincinnati, OH, et al. ] DATE DOCKETED: [081095]



| | DATE | NOTE | PROCEEDINGS & ORDERS |
|---|---|---|---|
| 1 | Aug 10 1995 | G | Petition for writ of certiorari filed. |
| 2 | Sep 7 1995 | | Brief of respondent City of Cincinnati in opposition filed. |
| 3 | Sep 8 1995 | | Brief of respondents Equal Rights, Not Special Rights, et al. in opposition filed. |
| 4 | Sep 11 1995 | | Brief amici curiae of Ohio Human Rights Bar Association, et al. filed. |
| 5 | Sep 11 1995 | | Brief amici curiae of People for the American Way, et al. filed. |
| 6 | Sep 13 1995 | | DISTRIBUTED. October 6, 1995 (Page 3) |
| 7 | Sep 15 1995 | X | Reply brief of petitioners filed. |
| 8 | May 20 1996 | | REDISTRIBUTED. May 24, 1996 (Page 18) |
| 9 | May 22 1996 | X | Supplemental brief of petitioners filed. |
| 11 | May 28 1996 | | REDISTRIBUTED. May 31, 1996 (Page 13) |
| 13 | Jun 3 1996 | | REDISTRIBUTED. June 7, 1996 (Page 14) |
| 15 | Jun 10 1996 | | REDISTRIBUTED. June 14, 1996 (Page 15) |

*** Related Case - Use VIDE,LS with HF ***

Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [06/24/96]

CASE NBR: [95100239] CFX STATUS: [DECIDED ]
SHORT TITLE: [Cincinnati Equality Fndn. ]
VERSUS [Cincinnati, OH, et al. ] DATE DOCKETED: [081095]



| | DATE | NOTE | PROCEEDINGS & ORDERS |
|---|---|---|---|
| 16 | Jun 17 1996 | | Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of Romer v. Evans, 517 U. S. ------ (1996). Dissenting opinion by Justice Scalia with whom The Chief Justice and Justice Thomas join. (Detached opinion.) |

**********

*** Related Case - Use VIDE,LS with HF ***

No. 95-95-239 



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

*Petitioners,*

—v.—

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

PATRICIA M. LOGUE
SUZANNE B. GOLDBERG
*Lambda Legal Defense and Education Fund, Inc.*
17 East Monroe, Suite 212
Chicago, Illinois 60603
(312) 759-8110

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

ALPHONSE A. GERHARDSTEIN
*Counsel of Record*
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

SCOTT T. GREENWOOD
*Cooperating Counsel for the American Civil Liberties Union of Ohio Foundation, Inc.*
441 Vine Street, Suite 2301
Cincinnati, Ohio 45202
(513) 684-0101

*Attorneys for Petitioners*

## QUESTIONS PRESENTED FOR REVIEW

1. Whether an initiated city charter amendment that forbids the city and its boards and commissions from adopting or enforcing any ordinance, regulation, rule or policy that would provide protected status to lesbians, gay men, and bisexuals warrants heightened scrutiny under the Equal Protection Clause because it imposes a distinct and severe burden on their fundamental right to participate in the political process on an equal basis with other citizens?

2. Whether such a city charter amendment violates the Equal Protection Clause even under the Court's standard of rational basis review where it gives effect to private prejudice and does not rationally further any legitimate government interest?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES





## TABLE OF AUTHORITIES
(continued)

## TABLE OF AUTHORITIES
(continued)





## TABLE OF AUTHORITIES
(continued)

No. 95-

---

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

---

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, AND H.O.M.E., INC.,

*Petitioners,*

v.

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., AND ALBERT MOORE,

*Respondents.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

Petitioners respectfully petition for a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this proceeding.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 54 F.3d 261 (6th Cir. 1995), and is reprinted in the Appendix ("App.") to this petition at 2a-22a. The opinions

of the District Court for the Southern District of Ohio are reported at 860 F. Supp. 417 (S.D. Ohio 1994) (granting permanent injunction), *see* App. 23a-88a, and at 838 F. Supp. 1235 (S.D. Ohio 1993) (granting preliminary injunction), *see* App. 89a-105a. The Order of the Court of Appeals granting a stay of its mandate through August 10, 1995, was issued on June 14, 1995, and is reprinted in the Appendix at 1a.

## JURISDICTION

The Court of Appeals for the Sixth Circuit entered judgment on May 12, 1995. *See* App. 2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

On November 2, 1993, the Cincinnati voters passed Amendment XII to the City Charter of the City of Cincinnati. This provision, which was designated on the ballot and is generally known as Issue 3, reads as follows:

> NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS
>
> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.



## PRELIMINARY STATEMENT

This equal protection case merits the Court's review because it presents the same issue as another case currently before the Court, *Romer v. Evans*, No. 94-1039, as to whether an amendment to a governing charter, which denies lesbians, gay men and bisexuals equal access to government, burdens their fundamental right to participate in the political process. The parties in *Romer* also have briefed the rational basis arguments fully but the courts below did not rule on the issue. In this case, the District Court developed a full record on the rational basis issue and held, based on the record, that the charter amendment was unconstitutional. Ignoring the District Court's findings and the classification actually drawn by Issue 3, the Court of Appeals reversed and upheld the measure.

It is therefore also important that *certiorari* be granted to give the Court the opportunity to consider additional argument on the issue of rational basis with the benefit of a full record and the rulings below. If the Court upholds the Colorado Supreme Court's ruling in *Romer* on the fundamental rights issue, the rational basis question need not be reached, and this case could be remanded in light of that decision. If, however, the Court rejects the fundamental rights analysis adopted by the Colorado Supreme Court in *Romer*, this case will assist significantly in resolution of the rational basis question.

## STATEMENT OF THE CASE

1. *The Scope and Effect of Issue 3*

In 1993, a proposed amendment to the municipal charter of the City of Cincinnati was placed on the ballot as Issue 3, largely by the efforts of respondent Equal Rights Not Special Rights ("ERNSR") through its predecessor Take Back Cincinnati. In extraordinarily sweeping language, Issue 3 proposed to bar the City from undertaking to "enact, adopt,

enforce or administer" any present or future "ordinance, regulation, rule or policy" within its sights.

Those sights were focused solely on lesbians, gay men, and bisexuals. Any action by the City that could be construed to give "protected" or "preferential" treatment to any person on the basis of "homosexual, lesbian or bisexual orientation, status, conduct or relationship," whether now or in the future, would be barred by its terms. The scope and design of this measure was unprecedented in Cincinnati's history. One expert witness on civil rights matters who testified at the trial in this case aptly described it as the "nuclear bomb" of charter amendments. R. 18:172.[1]

Prior to the Issue 3 ballot measure, the City had enacted a Human Rights Ordinance that protected all persons against discrimination on the basis of sexual orientation (as well as many other characteristics) in private employment, housing, and public accommodations. The City Council passed this measure in 1992 after documenting extensive evidence of discrimination based on sexual orientation in these areas and in response to its findings about the "profound effects of such discrimination." Jt. App. 670. In addition, the City Council had previously enacted an Equal Employment Opportunity Ordinance that protected all persons against discrimination on the basis of sexual orientation in public employment. Jt. App. 668.

Issue 3 was designed, in part, to neutralize the effect of these laws, *but only* insofar as they were applicable to lesbians, gay men, and bisexuals. By contrast, the proposed charter

[1] The full record in the District Court will be referred to as "R." References to the Joint Appendix before the Court of Appeals will be described as "Jt. App." Plaintiffs' exhibits, deposition exhibits and joint exhibits not included in the Joint Appendix will be referred to respectively as "Pltf. Ex.," "Depo. Ex." and "Jt. Ex."



amendment would have no effect on existing and future protections conferred by the City on heterosexuals.[2]

Issue 3 also would explicitly prevent the future inclusion of lesbians, gay men, and bisexuals within any anti-discrimination law or policy, and thus would preclude any municipal response to many documented problems in this regard. Examples of anti-gay discrimination and harassment by private actors and public officials, including judges and police officers, abound in the trial record, which includes the legislative record compiled by the City Council prior to passage of the Human Rights Ordinance.[3] Normally, such citizen concerns are corrected by approaching city officials or forming political coalitions to secure passage of new legislation. R. 89:65. But future recurrences of discriminatory acts could not be remedied by City officials under Issue 3. Existing City programs also were imperiled by the broad sweep of the proposed measure. These included an HIV-prevention program directed exclusively at gay men that, while undeniably of benefit to the entire public, might be construed to give "preferential treatment" to gay people.

A Republican former City Council member testified that Issue 3 would effectively cut lesbians, gay men, and bisexuals

[2] Shortly after oral argument in the Sixth Circuit, the City Council repealed the provisions of the Human Rights Ordinance forbidding discrimination on the basis of sexual orientation, thus mooting the immediate impact of Issue 3 on that measure. However, the impact of Issue 3 on the Equal Employment Opportunity Ordinance and all future civil rights measures remains very much at issue in this case.

[3] *See, e.g.*, Pltf. Ex. 393 (complaint to City Manager about violence and harassment); Pltf. Ex. 394 (complaint about police flyer which employed the term "fag" bars); Pltf. Ex. 395 (1988 statewide survey on discrimination against lesbians, gay men and bisexuals); Pltf. Ex. 398 at 5-7 (summary of anti-gay acts by police and discrimination complaints by lesbians, gay men and bisexuals); Jt. App. 388-90, 402-03, 425-26.

out of City politics and would close off avenues of dispute resolution that are readily available to all other constituents. R. 29:59-62. As a result, the clear effect of Issue 3 would be to deny only to members of this targeted group access to the legislative body on an equal basis with all other citizens.

2. *The History of Issue 3 and Private Bias*

Issue 3 was proposed as an open and obvious effort to reduce the political power and influence of gay people within the City of Cincinnati. Phil Burress, one of the primary instigators of Issue 3, testified that the Human Rights Ordinance "was only 10 percent of the issue. Ninety percent of the problem was the fact that the homosexuals . . . were going to start pushing their agenda through their elected officials." Jt. Ex. X at 43. He and Chris Finney, who drafted the actual text of Issue 3, both freely admitted that the amendment was designed as a direct response to the perception of growing gay political power in Cincinnati. Jt. App. 457.

The goal of neutralizing the political power of lesbians, gay men and bisexuals was accomplished, as the District Court found, by means of ERNSR campaign materials and advertisements that were "grossly inaccurate" and "riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals." App. 40a, 74a. The "main educational tool" of ERNSR was the video "Gay Rights/Special Rights," which provides a vivid, fear-inducing, and inaccurate portrayal of gay people. Pltf. Ex. 26; Jt. App. 441-46; R. 89:485-86. ERNSR also circulated pamphlets that perversely and provocatively distorted facts and data about gay people.[4] In particular, ERNSR prominently highlighted false

[4] The pamphlets were authored by Paul Cameron, a psychologist who has been formally criticized by several professional associations for misrepresenting data about gay people and who was dropped from membership in the American Psychological Association "for a violation of the Preamble to the *Ethical Principles of Psychologists*." Jt. App. 722; Jt. Ex. 5; Depo. Ex. 2 at 80 n.9. They were entitled "*Child Molestation and Homosexuality*," "*Medical Consequences of*



stereotypes of gay men as pedophiles, App. 28a, including depictions of a fabricated "Real Homosexual Agenda," which included the statement that "they want the children." Pltf. Exs. 22; 26; 31; 39.

Gay people also were described in the most "inflammatory" terms and were portrayed, for example, as habitually engaging in bizarre sexual practices, including some "which allegedly involved the use of rodents." App. 60a n.16. Expert witnesses in political history and on civil rights issues pointed out that the inaccurate sexual stereotyping of lesbians, gay men and bisexuals during the Issue 3 campaign has direct historical parallels in arguments that have been used to malign African-Americans, Jews, and Mexican-Americans. Jt. App. 442; 739-40.

ERNSR also distributed "patently misleading" materials which mischaracterized Issue 3 and the Human Rights Ordinance to sway potential voters. App. 40a-41a n.7. In particular, the Human Rights Ordinance, whose wording is precisely neutral on the issue of sexual orientation, was consistently referred to as providing "special rights for homosexuals." *Id. See, e.g.*, Pltf. Exs. 34; 39. Issue 3 also was consistently billed as a mere repealer of the Human Rights Ordinance, rather than as a superlegislative measure that disables the political participation rights of lesbians, gay men and bisexuals now and in the future. App. 40a-41a n.7; Pltf. Ex. 34.

At trial, civil rights experts reviewed the above materials and concluded that Issue 3 was sold to voters through naked appeals to prejudice and their "base" instincts. *See, e.g.*, Jt. App. 394. Thus, as a ballot proposal, Issue 3 was turned into an "up/down" vote on gay people. Jt. App. 400. *See also* R. 89:4, 521.

*What Homosexuals Do*," "*Violence and Homosexuality*," and "*What Causes Homosexual Desire and Can It Be Changed?*" (Pltf. Exs. 22-25).

In the District Court, petitioners presented extensive evidence to counter the malicious stereotypes that pervaded ERNSR's campaign. Detailed psychological and historical testimony, supported by a thorough review of authorities, explained the nature of sexual orientation as a deeply rooted aspect of human identity. The testimony illustrated as well that gay men and lesbians have been subjected to intense discrimination based on their sexual orientation. *See, e.g.*, Jt. App. 322-28J; 644-45; 754-74; 823-94. Respondents offered no evidence to validate the gross factual distortions about lesbians, gay men and bisexuals that were provided to voters during the Issue 3 campaign or to rebut petitioners' expert evidence on the nature of sexual orientation and anti-gay discrimination. App. 33a-34a.

3. *The Proceedings in the District Court*

Issue 3 was adopted by the voters of Cincinnati on November 2, 1993, and this suit was filed almost immediately thereafter. After conducting a day-long evidentiary hearing, the District Court issued a preliminary injunction barring enforcement of Issue 3 on November 16, 1993. *See* App. 89a-105a. Shortly before trial, the District Court denied the defendants' motion for summary judgment. *Id.* at 24a n.1. After five additional days of testimony taken in June of 1994 and upon consideration of a "massive" record, *id.* at 37a, the District Court permanently enjoined Issue 3 on August 9, 1994.

In granting these injunctions against Issue 3, the District Court made extensive findings of fact on many issues of fundamental importance in this case. Assessing Issue 3's effect on the political participation of its targeted class, the court found that Issue 3 foreclosed all ordinary political processes, except for the charter amendment process, for gay people seeking remedies from the City for sexual orientation discrimination and related harms. App. 43a-44a. Comparing the charter amendment process to the wide range of political routes available to all others desiring anti-discrimination protections, it found that "amending the city charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation." *Id.* at 39a-



40a, 42a. In addition, on the strength of voluminous and unrebutted expert testimony, the court found that gay citizens constitute "an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic." *Id.* at 39a. Further, to support its determination that Issue 3 gives effect to private prejudice, the court found that the campaign materials used by ERNSR to promote Issue 3 "emphasize[d] the depth and pervasiveness of the inaccurate and unfounded stereotypes about gays, lesbians and bisexuals in our society." *Id.* at 40a n.7.

The District Court then relied upon *Hunter v. Erickson*, 393 U.S. 385 (1969), and related cases to hold that Issue 3 violates the fundamental right of equal participation in the political process, thereby triggering heightened scrutiny under the Equal Protection Clause. App. 46a-54a. The court recognized that Issue 3 would deny gay people effective access to the legislative and executive branches of the city government on an equal basis with all other citizens, by foreclosing the route through which they would ordinarily seek the protection of the laws against both invidious discrimination and other harms. Instead, the only avenue left to them by Issue 3 would be gaining approval of a majority of voters to amend the municipal charter. *Id.* at 41a-45a.

In addition, the District Court held that Issue 3 enacted private prejudice into law and did not serve any legitimate governmental purpose. App. 68a-76a. The court rejected a morality-based justification put forth for Issue 3 as "a surrogate for the majority's desire to discriminate against an unpopular minority group." *Id.* at 74a. The court also concluded that other alleged interests asserted by the proponents of Issue 3 could not explain or justify the classification drawn by the measure.[5] *Id.* at 69a-73a.

---

[5] The District Court also correctly held that Issue 3 violated petitioners' First Amendment rights to freedom of speech and association, and to petition for redress of grievances; that classifications based on sexual orientation are quasi-suspect; and that Issue 3 was void for vagueness. *See* App. 55a-68a; 76a-87a.

4. *The Sixth Circuit's Ruling*

The Court of Appeals began by improperly applying the same *de novo* review to the District Court's factual findings that it applied to the court's legal conclusions, on the ground that "most, if not all, of the lower court's findings in the instant case constituted ultimate facts," "sociological judgments" or findings "designed to support 'constitutional facts.'" App. 9a. Having taken this unorthodox approach, the Court of Appeals went on to reverse the District Court in its entirety.

In particular, the Court of Appeals held that there is no fundamental right of equal political participation that could be infringed by Issue 3. It mischaracterized this Court's *Hunter* line of decisions as concerning only racial classifications, content to stop at the observation that Issue 3 "deprived no one of the right to vote, nor did it reduce the relative weight of any person's vote." App. 17a.

In another section of its opinion, the court went so far as to suggest that "no law can successfully be drafted that is calculated to burden . . . or to benefit . . . an unidentifiable group of individuals" unless the members of that group can be identified "on sight." App. 13a. Obviously, if this approach were widely adopted it would threaten grossly to distort judicial review of all government actions that discriminate on the basis of characteristics (such as religion, ethnicity, age, and veteran status) that may not be visible to the naked eye.

After determining that rational basis review was the appropriate standard, the Court of Appeals gave no consideration whatsoever to the District Court's pivotal determination that Issue 3 gave effect to private prejudice. The court went on to conclude that several rational bases existed to uphold Issue 3. These included the supposed enhancement of "associational liberty" that was judged to flow from Issue 3 insofar as it reauthorized acts of discrimination against gay citizens. App. 20a. The court also opined that Issue 3 would

---

Petitioners do not seek review of the Sixth Circuit's reversal of these other rulings.



reduce government regulation, "which necessarily may result in some cost savings for the City's taxpayers." *Id.* On June 14, 1995, the Court of Appeals entered a stay of its judgment. *Id.* at 1a.

## REASONS FOR GRANTING THE WRIT

Cincinnati is one of a number of localities and states to consider the enactment of a constitutional or charter provision that would prohibit government from taking any action that could be construed as affording protection to its lesbian, gay, and bisexual constituents. Similar measures have been introduced through the initiative process or in legislatures in at least fourteen states across the country thus far, and many more have been suggested for introduction.[6] One such measure was enacted as Colorado's Amendment 2, which is currently under review by the Court in *Romer v. Evans*, No. 94-1039. This case presents many of the same important questions of federal law that are also before the Court in *Romer*, which now has been fully briefed and awaits oral argument.

If the facially discriminatory Issue 3 and Amendment 2 measures were to be upheld, then it is virtually certain that similar measures will be proposed elsewhere, and it is likely that additional measures aimed at limiting the political participation of lesbian, gay, and bisexual citizens -- or other disfavored groups of citizens -- will also be formulated and put forward for adoption. As the evidence in these two cases shows, these anti-democratic measures are typically promoted by fearmongering that exploits popular myths and stereotypes about targeted groups of citizens. They seek to recast appropriately neutral anti-discrimination laws protecting all

---

[6] *See Anti-Gay Rights Drive Spreads*, Denver Post, Oct. 12, 1994, at 1. *See also* Adams, *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 Ohio St. L.J. 583, 584 n.2 (1994).

persons as measures providing "special rights" to a few.[7] Nonetheless, it appears to date that these measures, at least when presented in the context of plebiscite campaigns, may well win majority support in a number of jurisdictions. App. 39a; 65a.

History would thus repeat itself within the span of one generation. For this is not the first time that efforts have been made through majoritarian processes to jerrybuild a two-tiered system that extends full political access to some citizens and limited access to others. As the civil rights movement gained momentum around the country in the 1960s, opponents of that movement launched a spate of voter initiatives intended to disable governments from ever enacting or enforcing legal protections that were designed to overcome broad historical discrimination on the basis of specified characteristics, such as race, religion, and national origin. These measures appeared poised to sweep the country until they were halted in their tracks by the Court's clear ruling in *Hunter v. Erickson*, 393 U.S. 385 (1969), that the Equal Protection Clause forbids measures that have the purpose and effect of deliberately excluding a targeted group of citizens from participating in the political process on an equal basis with all other citizens. In this case, as in *Romer*, the Court's care and wisdom is needed to enforce the fundamental principle of equal justice that lies at the core of this constitutional provision. Only by this means, perhaps, can the United States maintain its stature as a country in which "the concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

---

[7] *See* Marcossen, *The Special Rights Canard in the Debate over Lesbian and Gay Civil Rights*, 9 Notre Dame J.L., Ethics & Pub. Pol'y 137 (1995); Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 Harv. C.R.-C.L. L. Rev. 283, 293-94, 300-07 (1994).



## I. THE RULING BELOW CONFLICTS WITH THE DECISION UNDER REVIEW IN *ROMER v. EVANS* AND WITH THIS COURT'S PRECEDENTS THAT SAFEGUARD THE FUNDAMENTAL RIGHT TO PARTICIPATE IN THE POLITICAL PROCESS ON AN EQUAL BASIS.

A principal issue raised in this case is whether this Court's precedents, commencing with *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Hunter v. Erickson*, safeguard the fundamental right of all citizens to participate in the political process on an equal basis. *See Reynolds*, 377 U.S. at 565 ("each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."). The Sixth Circuit held in this case that a majority can enact a superlegislative measure that institutionally disables the political participation rights of members of a defined minority group, as long as it does not strip them of their right to cast a ballot or classify them on the basis of race. App. 16a-17a. The ruling below thus squarely contradicts the Colorado Supreme Court's decision that is currently under review by this Court in the *Romer* case. *See Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995). Moreover, as the Court clearly held in *Hunter* more than a quarter-century ago, and has since reaffirmed, this narrow conception of the Equal Protection Clause is emphatically not a correct statement of American constitutional law.

### A. The Ruling Below Directly Conflicts with the Decision Under Review in the *Romer* Case.

The language and the practical effect of Issue 3 are essentially identical to the Colorado measure known as Amendment 2, which is currently before this Court in the *Romer* case.[8] The District Court here, like the Colorado Supreme Court in *Romer*, held that the measure at issue operates to fence out the targeted class of lesbians, gay men,

---

[8] The text of Issue 3 additionally bars any "preferential treatment" of gay people.

and bisexuals from the political process by imposing a unique burden on their ability to participate on an equal basis with all other citizens. *See* App. 41a-54a; *Romer*, 882 P.2d at 1339, 1340. On this ground, the District Court here, as did the Colorado Supreme Court in *Romer*, concluded that the measure requires heightened scrutiny and violates the Equal Protection Clause. App. 53a-54a; *Romer*, 882 P.2d 1335.

The Sixth Circuit, in contrast, determined that Issue 3 does not implicate any fundamental rights that have been recognized by this Court. It concluded instead that the cases relied on by the District Court could be applied only to measures that classify on the basis of race or strip people of the right to vote. *See* App. 16a-17a. The clear conflict between the ruling below and the Colorado Supreme Court's decision in *Romer* should be addressed and resolved by this Court.

### B. The Ruling Below Conflicts with the Court's Precedents Including *Reynolds v. Sims* and *Hunter v. Erickson* by Adopting a Dangerously Crabbed Interpretation of Their Holdings.

The municipal charter amendment at issue in this case would, as the Court of Appeals expressly recognized, "render futile" all efforts by gay people in Cincinnati -- and gay people alone -- to seek legal protection from their city government against discrimination. *See* App. 17a. It is firmly established, however, that legislation which restricts participation in the political process by any specified group of persons threatens the legitimacy of representative government and implicates the core principles of the Equal Protection Clause. *See, e.g., United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). As the Court indicated in that historic footnote, "more exacting judicial scrutiny" may be in order where a challenged measure "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Id.* The Court's rationale for such heightened scrutiny went well beyond simple constraints upon the right to vote, and included a variety of further constraints, such as "interferences with political organizations" and the "prohibition of peaceable



assembly." *Id. See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 73-104 (1980).

The "political process" rationale for heightened scrutiny first articulated in *Carolene Products* was developed more fully as the Court began to confront cases in which political participation was structured unequally for different sets of citizens. *See, e.g., Reynolds*, 377 U.S. 533. The Court's careful protection of the right to vote in those cases was based on far more than a limited commitment to an accessible ballot box. Beginning in *Reynolds*, the Court has reinforced in a series of cases that the right to vote is important, not in a vacuum, but as a component part of the right to participate meaningfully in our representative democratic process.[9]

The Court further explicated this rationale with respect to the process of enacting legislation in *Hunter v. Erickson*, 393 U.S. 385 -- a case that is marked by striking similarities to the legal controversy that surrounds Issue 3. In *Hunter*, the Court confronted an Akron, Ohio charter amendment that barred the Akron City Council from passing any legislation that would protect individuals against housing discrimination on the basis of race, religion, or national origin, without obtaining the

---

[9] Thus, the Court has decided a series of cases invalidating malapportioned election districts, *see, e.g., Board of Estimate v. Morris*, 489 U.S. 688, 701 (1989); *Avery v. Midland County*, 390 U.S. 474 (1968), ballot access restrictions, *see, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), gerrymandered electoral districts, *see, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 141-42 (1971); *Gomillion v. Lightfoot*, 362 U.S. 339 (1960), and conditions placed on the right to vote, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

express approval of a majority of the City's voters. The Court invalidated the measure under the Equal Protection Clause.[10]

While recognizing that the City could require plebiscites as a general practice, the Court made it clear that the City could "no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393. It is especially significant, in light of the attempt by the court below to brush off *Hunter* as a case solely about racial classifications, that the two cases relied on for this holding by the Court in *Hunter* did not concern racial laws. Instead, they were decisions explaining that the right to vote means more than just *the ability to cast a vote*, and instead guarantees *the right to cast an effective vote* by ensuring that each vote is given essentially the same weight as that cast by every other citizen. *See Reynolds*, 377 U.S. 533; *Avery v. Midland County*, 390 U.S. 474.

The Court's analysis was consistent with the *amicus* brief that Solicitor General Griswold had filed on behalf of the United States Government, which urged that the Akron measure be invalidated. The Solicitor General's brief argued simply that the Equal Protection Clause precludes a state or local government from using interferences with the *legislative stage* of the political process to achieve what the Clause prohibits them from achieving by interfering with the *voting and*

---

[10] The Court noted in *Hunter* that the challenged measure drew no specific distinctions among racial and religious groups, and thus treated "Negro and white, Jew and gentile in an identical manner," yet the Court considered its practical effect, which was to "disadvantag[e] those who would benefit from laws barring racial, religious, or ancestral discrimination" -- and as the Court observed, "the reality is that its impact falls on the minority." 393 U.S. at 390-91. There can be no question that Issue 3 burdens members of a minority group because, unlike the facially neutral Akron amendment, Issue 3 expressly targets only lesbians, gay men and bisexuals.



*representation stages* of the political process. *See* Brief for the United States as Amicus Curiae, *Hunter v. Erickson*, 393 U.S. 385 (1969), at 15 ("The same principles which forbid these and other forms of imbalance in the electoral processes apply, *a fortiori*, when what is at stake is the end product to which these are preliminary and preparatory steps -- *i.e.*, the very enactment of legislation.").[11]

Justice Harlan's separate concurrence in *Hunter* explained the constitutional principles involved in further detail. He observed that most laws that structure internal government processes "are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete," and where such laws are so "grounded in neutral principle" they are consistent with the Equal Protection Clause. *Hunter*, 393 U.S. at 393, 395 (Harlan, J., concurring). Yet where such measures do not attempt "to allocate governmental power on the basis of any general principle," but instead are designed to "make it more difficult" for identifiable minority groups "to achieve legislation that is in their interest," then heightened scrutiny is in order under the Equal Protection Clause. *Id.* at 395.

In subsequent cases, the Court has consistently construed its decision in *Hunter* as having relied on a political participation rationale, rather than as turning simply on the existence of a racial classification. *See, e.g., James v. Valtierra*, 402 U.S. 137, 141-42 (1971) (considering first a suspect class theory and then a distinct political participation theory in assessing an equal protection challenge to a

---

[11] The Solicitor General's brief also provided the following illuminating example: "Thus, just as a state may not weight its legislature to overrepresent rural interests, so also it may not provide, for example, that laws benefiting its cities shall become effective only if passed by three successive legislatures. And the constitutional prohibition against disenfranchising Negroes or the poor would forbid a state to prescribe, for instance, that laws protecting the rights of racial minorities or laws designed to help the disadvantaged require a two-thirds vote in its legislatures." *Id.* at 15-16.

constitutional amendment that required voter approval on specific matters); *Gordon v. Lance*, 403 U.S. 1, 5 (1971) (addressing a constitutional amendment that required supermajority support from voters on specific matters, which the Court upheld, in contrast to *Hunter*, because it could "discern no independently identifiable group" that would be "fenced out" of the normal political process); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982) (proper inquiry is whether laws structure political institutions according to "'neutral principles'" that place the same burdens on "*every* group in the community") (quoting *Hunter*, 393 U.S. at 394 (Harlan, J., concurring)). *Cf. J.E.B. v. Alabama*, __ U.S. __, 114 S. Ct. 1419, 1434 (1994) (Kennedy, J., concurring) ("individual's right to participate in the political process" is protected by the Equal Protection Clause, does not depend on existence of suspect class and goes beyond the right to vote to include right to serve on a jury).

The Sixth Circuit's ruling departed dramatically from the Court's guidance in this area. In two sentences, the Court of Appeals reinterpreted *Hunter* and *Seattle School District* as cases that were limited to consideration of suspect racial classifications. *See* App. 16a-17a. In a third sentence, it dismissed *Gordon* as being concerned only with the right to vote. *See id.* at 17a. Such inhospitable treatment of this Court's controlling precedents stands in direct conflict with the more deferential reading given them by the District Court in this case and the Colorado Supreme Court in *Romer*.[12]

---

[12] In addition, to the extent that the Court of Appeals suggests a "visibility" analysis, *see* App. 13a, for determining whether a law affects members of an identifiable group, its approach would be flatly inconsistent with this Court's precedents as well as common sense. Indeed, not even race is necessarily visible on sight, nor is it defined merely by appearance. *See, e.g., St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610-13 & n.4 (1987) (definitions of race can be sociopolitical; "a distinctive physiognomy is not essential to qualify" for protection under 42 U.S.C. § 1981).



The Court of Appeals' analysis also opens the door to a dangerous narrowing of the clear principles that the Court laid down in *Hunter*, which headed off an earlier round of structural manipulations of the political process that were deliberately designed to allow a majority of the voters to target and oppress a minority of citizens. The Court should take this opportunity to clarify the scope of its holding in *Hunter*, and to emphasize that laws which restructure the political process for members of one targeted group of citizens, by "consistently degrad[ing] [their] influence on the political process as a whole," are constitutionally infirm. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).

Indeed, the decision below violates the core promise of the Equal Protection Clause by allowing Issue 3 to strip from a targeted class of citizens the ability to gain the "protection of the laws" against discrimination and other harms without first surmounting special obstacles that are not erected for any other group of citizens. Because the charter amendment categorically bars the Cincinnati government from ever providing protection to lesbians, gay men, and bisexuals, based upon their sexual orientation, it presents a facial violation of the Fourteenth Amendment's guarantee of equal *protection* of the laws. *See* Brief of Laurence H. Tribe, *et al.*, *Romer v. Evans*, No. 94-1039.

## II. THE RULING BELOW MISAPPLIED RATIONAL BASIS REVIEW TO UPHOLD A BLATANTLY DISCRIMINATORY AND EXCLUSIONARY MEASURE THAT DOES NOT RATIONALLY FURTHER ANY LEGITIMATE GOVERNMENT INTEREST.

In addition to raising critical questions, as in *Romer*, about the fundamental right to equal participation in the political process, the ruling below departs sharply from this Court's approach to rational basis review where private bias infects the legislative process. It thus squarely presents the Court with the opportunity to resolve this disjunction and to clarify the proper application of the rational basis test when a law is found to

give effect to animus, irrational fear and private prejudice. A definitive resolution of this question would provide guidance in a wide range of cases and thus merits plenary review. Moreover, this case raises important questions as to the application of rational basis review when legislation demarcates who may seek government remedies for discrimination and other wrongs and who may not. The Court should accept review to clarify that it is the exclusionary *classification* drawn by Issue 3 in this context that must be justified by a legitimate governmental purpose, one tied to the law's practical effects. The generalized justifications accepted by the Court of Appeals for the political disabling of lesbian and gay citizens by Issue 3 were divorced from these constitutional touchstones. The Sixth Circuit's approach, which threatens to make any such law unreviewable under the Equal Protection Clause, should be soundly rejected by this Court.

### A. The Ruling Below Disregards the Court's Decisions Which Hold that Giving Effect to Private Prejudice Is Not a Legitimate Government Interest.

The Sixth Circuit's ruling in this case warrants review because it conflicts with many of this Court's precedents that have attached substantial significance to the existence of animus and prejudice in reviewing the constitutionality of laws under the "rational basis" standard. In general, it is only "absent some reason to infer antipathy" that the Court extends substantial deference in reviewing the justifications that are offered in defense of legislative classifications. *Vance v. Bradley*, 440 U.S. 93, 97 (1979), *quoted in FCC v. Beach Communications, Inc.*, ___ U.S. ___, ___, 113 S. Ct. 2096, 2101 (1993). Less deference is accorded where antipathy and bias are shown to be present and the challenged measure is found to be serving such improper purposes as fearmongering, the arousing of prejudice, or the fostering of negative attitudes toward a defined group of citizens. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-50 (1985). The Court has definitively stated that purposes such as these cannot suffice to sustain any law. *See id.* at 448 ("'private biases may be outside the reach of the law, but the law cannot,



directly or indirectly, give them effect'") (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). *See also United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("some objectives -- such as a bare desire to harm a politically unpopular group -- are not legitimate state interests"). In addition, the Court has held that "fear of the political views of a particular group" cannot justify "[un]equal opportunity for political representation." *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

In this case, based on the testimony and the evidence that was submitted about the background and the effect of Issue 3 and the campaign that was waged in support of its passage, the District Court found that this measure reflected a "'bare . . . . desire to harm a politically unpopular group.'" App. 75a (quoting *Moreno*, 413 U.S. at 534). The District Court also found that the impact of Issue 3 is to "giv[e] effect to private prejudice" and to place "the government's imprimatur on those acts of private bias carried out pursuant to Issue 3's unmistakable mission." App. 76a.

In reversing the District Court, the Court of Appeals did not purport to set aside these findings. Instead, it simply ignored them and proceeded to accord maximum legislative deference in its assessment of the constitutionality of Issue 3. In doing so, it gave no weight at all to the anti-gay antipathy that was evident from the text and background of Issue 3, as the Court in *Cleburne* and *Moreno* indicated should be done in applying rational basis review.

The raw incorporation of private bias, animus, and prejudice into provisions that have the force of law almost inevitably creates unequal treatment that is antithetical to the constitutional guarantee contained in the Equal Protection Clause. The likelihood of this result is unaffected by whether those actuating forces are open and obvious or instead are cloaked beneath pretextual justifications. The adoption of a measure like Issue 3, which institutionally disables the political participation rights of gay citizens, in the wake of a campaign that the District Court found was "riddled with unreliable data, irrational misconceptions and insupportable misrepresentations

about homosexuals," App. 40a, calls for more careful review akin to that in *Cleburne*. The Court should take the opportunity in this case to reaffirm this important point.

### B. The Court of Appeals Ignored the Classification Drawn by Issue 3 and Its Practical Effect in Accepting Highly Generalized Justifications for the Measure.

The Sixth Circuit's rational basis ruling also should be reviewed because the court did not focus on either the classification drawn by Issue 3 or the practical effect of the measure. The court's bare conclusion that Issue 3 "potentially further[s] a litany of valid community interests" of a highly generalized nature, App. 20a, avoids the hard question of whether it is rational to target lesbian, gay and bisexual citizens exclusively to bear the burden of serving these interests. The Court should accept review to forestall the inevitable and alarming consequences of the lower court's analysis. Under the Court of Appeals' approach, members of targeted minority groups will face permanent and arbitrary barriers to obtaining remedies for discrimination without any requirement that government have a meaningful rationale for singling them out. The Court should state plainly that the right to seek remedies from government for documented harms cannot be revoked in the name of abstract truisms that fail rationally to explain why this distinct and severe burden is selectively imposed only on some targeted citizens.

Any principled application of equal protection guarantees, even under rational basis review, must begin by examining what the measure does and whom it disparately affects. *See Moreno*, 413 U.S. at 537-38 (rational basis review must consider "practical effect" of law and whether "classification" has rational basis). In addition to its immediate repealing effects on city laws and policies, Issue 3 takes the extraordinary step of imposing a sweeping prospective bar to government action to protect lesbians, gay men and bisexuals and "render[s] futile" efforts to secure legal protection for gay citizens now and in the future. *See* App. 17a. It is this partitioning of the citizenry, which effectively closes the doors of City Hall only



to one targeted group of victims of bias and discrimination, which must be rationally justified.

The Sixth Circuit, however, failed to focus its review on the connection between the classification of lesbians, gay men and bisexuals and the asserted purposes served by Issue 3. The rationales it accepted were extremely generalized and could equally support -- if any justification could support -- a reduction in the political rights of heterosexual citizens or any other targeted group of voters. None of these proffered justifications even begins to address or explain the deliberate decision to single out lesbian, gay and bisexual citizens for the distinct and severe burden on their civil and political rights imposed by Issue 3.

For example, the Court of Appeals held that the measure was rationally justified because it

> reduced governmental regulation of the private social and economic conduct of Cincinnati residents [and] decreased municipal supervision of private conduct, which necessarily may result in some cost savings for the City's taxpayers. App. 20a-21a.

But a measure that singled out any targeted group of citizens, or operated on a selective basis to eliminate any or all anti-discrimination laws, would serve these interests equally well. Indeed, any measure that repeals or prevents passage of another law theoretically serves an interest in reducing governmental regulation and saving costs. But these hypothetical and extremely generalized consequences say nothing about why the measure would be justified in singling out only one particular group to bear the burden of achieving these goals.[13] "[E]ven

---

[13] Moreover, it should be noted, the factual record established that these interests were actually not served by limiting the classification in Issue 3 to lesbians, gay men and bisexuals, as the District Court found. App. 70a-71a. The measure would result in no measurable cost savings or deregulation, as the same resources and regulations were needed to protect heterosexuals and all others still served by existing City laws. *Id.*

the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, ___ U.S. ___, ___, 113 S. Ct. 2637, 2643 (1993). Here the relationship between the classification of lesbians, gay men and bisexuals and these asserted goals "is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446 (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) and *Moreno*, 413 U.S. at 535 (1973)). This is particularly true in a context in which basic civil and political rights, such as the ability to seek governmental protection from harm, are circumscribed. The opportunity to make a case to City legislators and administrators for protective laws or policies is not an area "where the legislature must necessarily engage in a process of line-drawing" between citizens. *Beach Communications*, ___ U.S. at ___, 113 S.Ct. at 2102 (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

The District Court similarly considered and dispatched several other abstract justifications put forward by the proponents of Issue 3, finding that the boundless generalities offered in support of the measure were insufficiently linked to the classification drawn in its text or to its actual impact. App. 71a-74a. In contrast, the Sixth Circuit accepted these justifications without meaningfully examining their relationship to Issue 3. For example, the Sixth Circuit's contention that Issue 3 "return[ed] the municipal government to a position of neutrality on the issue [of homosexuality]," *id.* at 20a, conflicted with the District Court's holding that Issue 3 "utterly frustrates" this asserted purpose, *id.* at 73a. The difference was that the Court of Appeals simply judged this justification to be a worthwhile goal in the abstract, while the District Court examined whether, in "practical effect," *Moreno*, 413 U.S. at 537, Issue 3 serves that goal, which it clearly does not.[14]

---

[14] The District Court correctly held that "[w]hile the mere absence of a law prohibiting discrimination on the basis of sexual orientation could arguably reflect governmental neutrality on the issue, Issue 3 is an affirmative statement to the City Council and city administration, and to all of the citizens of Cincinnati, that discrimination against homosexuals shall be permitted, and in all likelihood, shall never be prohibited no matter what the circumstances." App. 73a.



Likewise, citing Issue 3's elimination of penalties under the Human Rights Ordinance for anti-gay discrimination, the Sixth Circuit found that Issue 3 "enhanced associational liberty" and "augmented the degree of personal autonomy and collective popular sovereignty legally permitted" to Cincinnati residents. App. 20a-21a. But these asserted rationales could as robustly support repeal and future prohibition of any other limitation on discriminatory conduct against disfavored citizens. The mere invocation of a general desire to advance personal autonomy and associational liberty cannot explain the sweeping limitation of the rights of gay people -- and only gay people -- that is effected by Issue 3.

The Sixth Circuit's reliance upon the due process analysis in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), in support of a moral justification for Issue 3 is also flawed. App. 20a n.10. The Court did not hold in *Hardwick* that moral views supporting the criminalization of certain sexual acts are adequate to justify subordination of the civil rights of lesbians, gay men and bisexuals based on their sexual orientation. Issue 3 is not a prohibition of sodomy but a declaration of unequal political rights based on lesbian, gay or bisexual "orientation, status, conduct or relationship." It thus renders gay citizens unable to obtain governmental protection in many realms of their lives wholly unrelated to sexual conduct.[15] Such a

---

[15] Asserting that *de novo* review applies because the case involves "sociological judgments," App. 9a, the Court of Appeals ignored the District Court's findings as well as vast psychological and scientific evidence of record on the subject of sexual orientation. *See id.* at 37a-40a (district court findings of fact). It instead "found" that sexual orientation is a meaningless concept and, closing its eyes to Issue 3 and many other laws, declared that no law can be drafted to impose benefits or burdens based on sexual orientation alone. *Id.*

measure cannot be defended by rote citation to *Hardwick*, but only by demonstrating a rational connection between the classification drawn by the measure and the asserted justifications for it. *See Moreno*, 413 U.S. at 537.

Moreover, in the concrete setting of this case, the District Court correctly found that the morality-based justification offered by respondents masked illegitimate governmental purposes. After hearing the evidence and examining the text of Issue 3, the trial court held that this justification was put forward as "a surrogate for the majority's desire to discriminate against an unpopular minority group" and rejected it under *Cleburne*, 473 U.S. at 446-48. App. 74a-76a. The Sixth Circuit improperly ignored these factual findings despite the intense factual backdrop of the Issue 3 campaign and the level of animus and prejudice that surrounded the enactment of this measure.

Under the controlling decisions of this Court, rational basis review, albeit deferential, is not an empty charade in which appellate courts are free to ignore the law's actual effect on a targeted class of people. To the contrary, it is the law's discriminatory classification that must be defended with a rational justification. This case provides an opportunity for the Court to demonstrate that rational basis review of measures such as Issue 3 must be sufficiently meaningful to preserve the essential guarantees of equal protection of the laws.

---

at 13a. The court below thus failed to acknowledge the full impact of Issue 3. But as the unrebutted expert evidence established, one's orientation as gay, lesbian, heterosexual or bisexual is very real and deeply significant in many respects. It cannot be discounted as a matter of "sociological judgment" nor does it depend on conduct of any kind, sexual or otherwise. Moreover, a thorough historical record established that gay people are frequently targets for discrimination based on their identity as gay people rather than their "behavior." This incontrovertible fact has spurred the passage of the Cincinnati Human Rights Ordinance and more than 100 similar laws nationwide that bar discrimination based on sexual orientation. *See, e.g.*, Pltf. Ex. 9; App. 39a.



## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted here. In the alternative, this case should be held pending the Court's resolution of *Romer v. Evans*, No. 94-1039.

Respectfully submitted,

PATRICIA M. LOGUE
SUZANNE B. GOLDBERG
Lambda Legal Defense and
Education Fund, Inc.
17 East Monroe, Suite 212
Chicago, Illinois 60603
(312) 759-8110

ALPHONSE A. GERHARDSTEIN
*Counsel of Record*
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

SCOTT T. GREENWOOD
Cooperating Counsel for the
American Civil Liberties Union
of Ohio Foundation, Inc.
441 Vine Street, Suite 2301
Cincinnati, Ohio 45202
(513) 684-0101

*Attorneys for Petitioners*

August 9, 1995

# APPENDIX

Case Nos: 94-3855; 94-3973; 94-4280

**UNITED STATES COURT OF APPEALS**

**FOR THE SIXTH CIRCUIT**

**ORDER**

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.; RICHARD BUCHANAN; CHAD BUSH; EDWIN GREENE; RITA MATHIS; ROGER ASTERINO; HOME, INC.

Plaintiffs - Appellees

v.

CITY OF CINCINNATI;

Defendant - Appellant

EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; ALBERT MOORE

Intervenors - Appellants

BEFORE: KENNEDY, KRUPANSKY & NORRIS, Circuit Judges

Upon consideration of the appellee's motion to stay the mandate through August 10, 1995, which includes the full ninety (90) days permitted for filing a petition for writ of certiorari in the U.S. Supreme Court,

It is ORDERED that the motion be and hereby is GRANTED.

**ENTERED BY ORDER OF THE COURT**

Leonard Green/S
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0147P (6th Cir.)
File Name: 95a0147p.06
NOS. 94-3855/3973/4280

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, AND H.O.M.E., INC.,
Plaintiffs-Appellees,

v.

CITY OF CINCINNATI (94-3973/4280),
Defendant-Appellant,

EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., AND ALBERT MOORE (94-3855),
Intervening
Defendants-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed May 12, 1995



Before: KENNEDY, KRUPANSKY, and NORRIS, Circuit Judges.

KRUPANSKY, Circuit Judge. In case numbers 94--3855/3973, defendant/appellant the City of Cincinnati ("the City"), and intervening defendants/appellants Equal Rights Not Special Rights ("ERNSR"), Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore, challenged the lower court's invalidation of, and permanent injunction restraining implementation of, an amendment to the City Charter of Cincinnati ("the Charter") denominated "Issue 3" which was enacted by popular vote on November 2, 1993 and which then became Article XII of the Charter ("the Amendment"), for purported constitutional infirmities. In case number 94-4280, the City contested the district court's award of attorneys' fees and costs in favor of the plaintiffs.

On March 13, 1991, the Cincinnati City Council (the "Council") enacted Ordinance No. 79-1991, commonly known as the "Equal Employment Opportunity Ordinance." This measure provided that the City could not discriminate in its own hiring practices on the basis of

> classification factors such as race, color, sex, handicap, religion, national or ethnic origin, age, *sexual orientation*, HIV status, Appalachian regional ancestry, and marital status. (Emphasis added).

Subsequently, Council on November 25, 1992 adopted Ordinance No. 490-1992 (commonly referred to as the "Human Rights Ordinance") which prohibited, among other things, private discrimination in employment, housing, or public accommodation for reasons of sexual orientation. The opening paragraph of the Human Rights Ordinance expressed the purpose for the legislation as:

> PROHIBITING unlawful discriminatory practices in the City of Cincinnati based on

> race, gender, age, color, religion, disability status, *sexual orientation*, marital status, or ethnic, national or Appalachian regional origin, in *employment, housing,* and *public accommodations* by ordaining Chapter 914, Cincinnati Municipal Code. (Emphasis added).

Among other things, the new law created complaint and hearing procedures for purported victims of sexual orientation discrimination, and exposed offenders to potential civil and criminal penalties.

ERNSR was organized for the purpose of eliminating special legal protection accorded to persons based upon their sexual orientation pursuant to the Human Rights Ordinance. ERNSR campaigned to rescind the Human Rights Ordinance by enacting a proposed City Charter amendment (Issue 3), which was to be submitted directly to the voters on the November 2, 1993 local ballot. On July 6, 1993, plaintiff Equality Foundation of Greater Cincinnati, Inc. ("Equality Foundation") was incorporated by the opponents of the ERNSR agenda. A vigorous political contest between ERNSR and Equality Foundation, involving aggressive campaigning by both sides and high media exposure, ensued over Issue 3.

The ERNSR-sponsored proposed charter amendment ultimately appeared on the November 2, 1993 ballot as:

ARTICLE XII

> ***NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.***
>
> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance,



> regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Issue 3 passed by a popular vote of approximately 62% in favor and 38% opposed and became Amendment XII to the Cincinnati City Charter.

On November 8, 1993, plaintiffs Equality Foundation, several individual homosexuals (Richard Buchanan, Chad Bush, Edwin Greene, Rita Mathis, and Roger Asterino), and Housing Opportunities Made Equal, Inc. ("H.O.M.E.") (a housing rights organization) filed a complaint against the City under 42 U.S.C. § 1983 which alleged that their constitutional rights had been, or would potentially be, violated by the adoption of Issue 3, and sought temporary and permanent injunctive relief, a declaration that the Amendment was unconstitutional, and an award of costs (including attorneys' fees) under 42 U.S.C. § 1988. On November 15, 1993, ERNSR, Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore moved to intervene as parties allied with the City. On November 16, 1993, the trial court preliminarily enjoined the City from enforcing the Amendment. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati (Equality I)*, 838 F.Supp. 1235, 1243 (S.D. Ohio 1993). On December 27, 1993, the district court granted the intervention motion. On June 3, 1994, the trial court rejected a summary judgment motion initiated by the City and ERNSR.

A bench trial was conducted which generated extensive expert testimony reflecting the social, political, and economic standing of homosexuals throughout the nation and the homophobic discriminations that had been experienced by the individual plaintiffs and others. Subsequent to trial the judge issued extensive findings of fact.[1] *Equality*

---

[1] The trial judge made the following findings:

1. Homosexuals comprise between 5 and 13% of the population.

2. Sexual orientation is a characteristic which exists separately and independently from sexual conduct or behavior.

3. Sexual orientation is a deeply rooted, complex combination of factors including a predisposition toward affiliation, affection, or bonding with members of the opposite and/or the same gender.

5. [sic] Sexual behavior is not necessarily a good predictor of a person's sexual orientation.

6. Gender non-conformity such as cross-dressing is not indicative of homosexuality.

8. [sic] Sexual orientation is set in at a very early age -- 3 to 5 years -- and is not only involuntary, but is unamenable to change.

9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society.

10. There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals.

11. There is no correlation between homosexuality and pedophilia. Homosexuality is not indicative of a tendency toward child molestation.



12. Homosexuality is not a mental illness.

13. Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.

14. Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals.

15. Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic.

16. Gays, lesbians and bisexuals are often the target of violence by heterosexuals due to their sexual orientation.

17. In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless.

18. Coalition building plays a crucial role in a group's ability to obtain legislation in its behalf. Gays, lesbians and bisexuals suffer a serious inability to form coalitions with other groups in pursuit of favorable legislation.

19. No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead [sic] to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved.

20. The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and

*Foundation of Greater Cincinnati v. City of Cincinnati (Equality II)*, 860 F.Supp. 417, 426-27 (S.D. Ohio 1994). It concluded that the Amendment infringed the plaintiffs' purported "fundamental right to equal access to the political process," as well as First Amendment rights of free speech and association and the right to petition the government for redress of grievances, which violations of constitutional rights subjected the Amendment to a "strict scrutiny" constitutional evaluation. Additionally, the district court posited that, because homosexuals collectively comprise a "quasi-suspect class," the Amendment was alternatively reviewable under the intermediate "heightened scrutiny" constitutional standard. Moreover, the lower court found that "[the Amendment] was insufficiently linked to any governmental interest to pass constitutional muster" even under the deferential "rational basis" test. Finally, the district court adjudged the Amendment constitutionally deficient for vagueness. *Id.* at 449. On November 15, 1994, the district

---

bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible.

21. The inclusion of protection for homosexuals does not detract form [sic] the City's ability to continue its protection of other groups covered by the City's anti-discrimination provisions.

22. Amending the City Charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide campaign and support of a majority of voters. City Council requires a bare majority to enact or adopt legislation.

23. ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals.



court awarded $339,430.25 in attorneys' fees plus $35,028.07 in costs to the plaintiffs, to be paid by the City.

Generally, this court reviews findings of fact for clear error and conclusions of law *de novo*. *United States v. Critton*, 43 F.3d 1089, 1098 (6th Cir. 1995); *Rodgers v. Jabe*, 43 F.3d 1082, 1085 (6th Cir. 1995). However, where ostensible "findings of fact" are, in reality, findings of "ultimate" facts which entail the application of law, or constitute sociological judgments which transcend ordinary factual determinations, such "findings" must be reviewed *de novo*. *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500-1 & n.16, 104 S. Ct. 1949, 1959 & n.16 (1984); *Powell v. Texas*, 392 U.S. 514, 52122, 88 S.Ct. 2145, 2148-49 (1968); *Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989). Moreover, mixed questions of law and fact, like pure questions of law or of statutory interpretation, are reviewed *de novo*. *Paul Revere Insurance Co. v. Brock*, 28 F.3d 551, 553 (6th Cir. 1994). Furthermore, the sufficiency of the evidence to support a finding that a constitutional predicate (such as "actual malice" in a defamation action prosecuted by a public official) has been satisfied presents a question of law. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685-89, 109 S. Ct. 2678, 2694-96 (1989); *New York Times v. Sullivan*, 376 U.S. 254, 284-86 & n.26, 84 S. Ct. 710, 728-29 & n.26 (1964). Because most, if not all, of the lower court's findings in the instant case constituted ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support "constitutional facts" (to wit, the existence of a "quasi-suspect" class, or of a fundamental right which was invaded by the Amendment), *see* Note 1, *supra*, they are subject to plenary review.

The constitutional guarantee of equal protection insulates citizens only from unlawfully discriminatory *state action*; it constructs no barrier against *private* discrimination, irrespective of the degree of wrongfulness of such private

discrimination. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S. Ct. 1965, 1971 (1972). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution did not *compel* the City of Cincinnati to enact legislation to protect homosexuals from discrimination, and accordingly the City, through its ordinary legislative processes, was at liberty to rescind any previous enactments which had fashioned such safeguards. *See Crawford v. Board of Education of Los Angeles*, 458 U.S. 527, 538, 102 S. Ct. 3211, 3218 (1982). Accordingly, the mere *repeal* of certain sections of the Human Rights Ordinance which had previously protected homosexuals, lesbians, and bisexuals was not itself constitutionally assailable. However, the district court ruled that the Amendment not only nullified the previously-enacted special legal protection for homosexuals; rather, it assertedly prevented a distinct class of citizens from exercising certain equal protection and First Amendment rights in the future, which, in the lower court's analysis, triggered constitutional review of the Amendment. *See Equality II*, 860 F.Supp. at 428-34.

The Supreme Court has announced three tests against which the constitutional validity of a law (in this case, a city charter amendment) which purportedly disproportionately burdens a discrete class, or deprives some group of a purported right, may be judged. Generally, the "legislation is presumed to be valid and will be sustained if the classification drawn by the statute [or city charter amendment] is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985). This presumption of validity characteristic of the "rational relationship" rule typically applies to social and economic enactments, where the Court has recognized that "the Equal Protection Clause allows the States wide latitude, [citations], and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* By contrast, where a statute targets a "suspect classification" (such as race, alienage, or national origin)



which is seldom relevant to any legitimate state interest, or where a constitutional "fundamental right" is assaulted by operation of the legislation, a "strict scrutiny" test (the most rigorous constitutional standard) controls, and the enactment "will be sustained only if [it is] suitably tailored to serve a compelling state interest." *Id.* Finally, where a statute uniquely burdens a "quasi-suspect" class (a categorization such as gender or illegitimacy which, under most circumstances, but not all, does not create a sensible legislative distinction), the intermediate constitutional test of "heightened scrutiny" applies, and such law is presumed invalid unless it is "substantially related to a sufficiently important governmental interest." *Id.*, 473 U.S. at 440-41, 105 S. Ct. at 3254-55. The trial court, in the instant case, posited that homosexuals comprise a "quasi-suspect" class and, accordingly, applied the intermediate "heightened scrutiny" standard to the equal protection analysis of the Amendment. *Equality II*, 860 F.Supp. at 434-40.

In declaring this novel ruling, the lower court in the instant case misconstrued *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), wherein the Court mandated that homosexuals possess no fundamental right to engage in homosexual conduct and consequently that conduct could be criminalized. The *Bowers* Court further directed that the courts should resist tailoring novel fundamental rights. *Id.*, 478 U.S. at 195, 106 S. Ct. at 2846. Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected.[2]

---

[2] *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (*en banc*) (following *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause")).

The court below distinguished *Bowers* and its progeny by postulating that the Amendment does not create a *conduct*-based classification, but instead demarcated a *status*-based categorization. The trial court found that gays, lesbians, and bisexuals are not identified by any particular conduct; to the contrary, they are distinguished by their "sexual orientation," which references an innate and involuntary state of being and set of drives.[3] *Equality II*, 860 F.Supp. at 440. From this perspective, the Amendment uniquely affected individuals belonging to a discrete segment of society on the basis of their *status* as persons oriented towards a particular sexual attraction or lifestyle. *See id.* at 436-37.

---

*Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004, 110 S. Ct. 1296 (1990) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes"); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003, 110 S. Ct. 1295 (1990) (homosexuality is primarily behavioral in nature and as such is not immutable; "[a]fter *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm").

*Accord, Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*), *cert. denied*, 478 U.S. 1022, 106 S. Ct. 3337 (1986) (homosexuals compose neither a suspect nor a quasi-suspect class); *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903, 105 S. Ct. 1858 (1985) (legal classification of gays is not suspect) (both decided prior to *Bowers*).

[3] *See* Findings of Fact Nos. 2-8, *Equality Foundation*, 860 F.Supp. at 426, *quoted* at Note 1, *supra*.



Assuming *arguendo* the truth of the scientific theory that sexual orientation is a "characteristic beyond the control of the individual" as found by the trial court, *see id.* at 437, the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class. Many homosexuals successfully conceal their orientation. Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group[.]" *Bowen v. Gilliard*, 483 U.S. 587, 602, 107 S. Ct. 3008, 3018 (1987).

Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their *conduct* which identifies them as homosexual, bisexual, or heterosexual. Indeed, from the testimony developed by the record (including that of the plaintiffs' expert psychologist, Dr. John Gonsiorek, who attested that most people either engage in sexual behavior which is consistent with their sexual orientation or engage in no sexual activity at all), this court concludes that, for purposes of these proceedings, it is virtually impossible to distinguish or separate individuals of a particular *orientation* which predisposes them toward a particular sexual conduct from those who actually *engage* in that particular type of sexual conduct. *See, e.g., Ben-Shalom v. Marsh*, 881 F.2d at 463-64 (although individual exceptions may exist, a lesbian orientation is compelling evidence that the plaintiff has engaged in homosexual conduct and likely will do so again, and consequently a regulation which classifies lesbians does not categorize merely upon status but also upon the

reasonable inferences perceived from probable past and future sexual conduct).[4]

Therefore, *Bowers v. Hardwick* and its progeny command that, as a matter of law, gays, lesbians, and bisexuals cannot constitute either a "suspect class" or a "quasi-suspect class," and, accordingly, the district court's

---

[4] In any event, the Amendment passes equal protection scrutiny *even if* it is read as affecting a status-defined class, in that it imposes no *punishment* or *disability* upon persons belonging to that group but rather merely removes previously legislated *special protection* against discrimination from that segment of the population:

> It is true that the Constitution forbids *criminal punishments* based on a person's qualities -- we assume that this is what is meant by "status" -- rather than on his or her conduct. [Citation]. Yet, *this proposition has never meant that employment decisions* - which is what *this* case is about -- *cannot be made on such a basis*. One cannot be put in jail for having been born blind (although a blind person who drives a truck and kills someone could be jailed for his act). But it obviously would be constitutional for the military to prohibit blind people from serving in the armed forces, even though congenital blindness is certainly a sort of "status." *Steffan v. Perry*, 41 F.3d 677, 687 (D.C. Cir. 1994) (*en banc*) (emphasis partially added) (sustaining military regulations banning homosexuals from the Naval Academy and from service in the Navy).

*Compare Bowers v. Hardwick*, in which the Supreme Court validated a state-imposed *criminal sanction* against sodomy. By contrast, the Amendment did not punish or prohibit any aspect of the homosexual lifestyle, and indeed did not compel the deprivation of anything from any person by the use of government power because of his or her sexual orientation.



application of the intermediate heightened scrutiny standard to the constitutional analysis of the Amendment was erroneous.

In the alternative, the district court pronounced that the Amendment had denied the plaintiffs their purported "Fundamental Right to equal participation in the political process," which asserted constitutional deprivation triggered review under the highly demanding "strict scrutiny" standard. *Equality II*, 860 F.Supp. at 430-34. Because the Amendment foreclosed Council from legislating future preferential treatment for homosexuals, the trial court concluded that homosexuals had been deprived of their right to petition the municipal legislative forum for enactments designed to protect and advance their collective agenda. The court below erroneously fashioned this innovative right[5] from three Supreme Court decisions: *Hunter v. Erickson*, 393 U.S. 385, 89 S. Ct. 557 (1969); *Gordon v. Lance*, 403 U.S. 1, 91 S. Ct. 1889 (1971); and *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S. Ct. 3187 (1982).

In *Hunter*, the Court strictly scrutinized, and struck down, a voter-adopted amendment to the Akron City Charter which foreclosed the city council from legislating any race-based prohibition against discrimination in private housing without the prior authorization of a majority of the

---

[5] No circuit court of appeals has expressly recognized a general constitutional right to "participate fully in the political process." However, the United States Supreme Court has recently granted *certiorari* in a case in which the Colorado Supreme Court found a broad fundamental right to participate equally in the political process. *Evans v. Romer (Evans II)*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1092 (1995) (striking down as unconstitutional Colorado's Amendment 2, a voter-initiated amendment to the Colorado constitution similar to Cincinnati's Issue 3). *See also Evans v. Romer (Evans I)*, 854 P.2d 1270, 1276-84 (Colo. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 419 (1993).

voters. The *Hunter* opinion was anchored in the "suspect classification" of race, *not* in any averred fundamental right to lobby the City council for favorable legislation. *Hunter*, 393 U.S. at 391-92, 89 S. Ct. at 561. *See James v. Valtierra*, 402 U.S. 137, 91 S.Ct. 1331 (1971);[6] *Arthur v. City of Toledo*, 782 F.2d 565, 573 n.2 (6th Cir. 1986). Likewise, *Washington v. Seattle School District No. 1*, in which the high Court invalidated a state voter approved

---

[6] In *James*, a voter-approved amendment to the California constitution directed that no public housing project could be maintained without the prior approval of a majority of those voting in the local community election. This amendment created the same procedural hurdle as reviewed in *Hunter* -- certain classes of local legislation could take effect only with the approval of the majority of local voters. However, in *James*, no suspect class or fundamental right was at issue. The *James* Court declared:

> The Court [in *Hunter*] held that the amendment created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election.
> **********
> *Unlike the Akron referendum position, it cannot be said that [the California amendment] rests on "distinctions based on race."* [Citation]. The [California] Article requires referendum approval for any low-rent housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. [Citation]. *The present case could be affirmed only by extending Hunter, and this we decline to do. Id.*, 402 U.S. at 140-41, 91 S. Ct. at 1333. (Emphasis added).



initiative which was designed to preclude bussing of students to achieve racial desegregation, turned upon a suspect racial classification. *Washington*, 458 U.S. at 48487, 102 S. Ct. at 3202-4. *See also Arthur*, 782 F.2d at 573 n.2, 574. Finally, *Gordon v. Lance* involved the recognized fundamental right to *vote*,[7] not an all-inclusive asserted right to participate fully in the political process. *Cf. Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993) (ruling that, unlike voting, the "right" to sign an initiative petition, and the "right" to obtain certification of a proposed initiative, are not fundamental, thereby deciding by necessary implication that non-voting forms of political activity are not categorically fundamental).

The instant Amendment deprived no one of the right to vote, nor did it reduce the relative weight of any person's vote. Pursuant to the Amendment, homosexuals remained empowered to vote for City Council members and to lobby those Council members concerning issues of interest. The only effect of the Amendment upon Cincinnati citizens was to render futile the lobbying of Council for preferential enactments for homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority. *See Hunter*, 393 U.S. at 392, 89 S. Ct. at 561. The Amendment does not impair homosexuals and other interested parties from seeking to repeal the Amendment on another day through the same political process by which Issue 3 became law -- the charter

---

[7] In *Gordon*, the Justices *rejected* the claim that a state constitutional requirement that state bonded indebtedness or tax rates may not exceed certain levels in the absence of 60% voter approval by referendum violated the United States Constitution, dictating that this provision deprived no group of its fundamental right to vote, even though in some instances a majority vote would be insufficient to affect policy on a particular subject, and further ruled that no "discrete or insular minority" was disabled thereby. *Id.*, 403 U.S. at 2-6; 91 S. Ct. at 1890-92.

amendment procedure. In addition, gays, lesbians, and bisexuals may seek relief through other political avenues and fora, such as the Ohio state legislature or the United States Congress. As the *realization* of their political agenda is not constitutionally guaranteed, the narrow restriction created by the Amendment upon the political avenues available to the unidentifiable and non-protected class of homosexuals and their allies respecting a narrow spectrum of substantive issues clearly does not rise to constitutional dimensions. Those who opposed Issue 3 simply lost one battle of an ongoing political dispute.

The district court directed that the Amendment impermissibly burdened the plaintiffs' First Amendment rights of free speech and association, and their right to petition the government for redress of grievances. *Equality II*, 860 F.Supp. at 444-47. This reviewing court rejects that conclusion. The Amendment erected no official obstacle to the exercise of anyone's free speech or free association rights. The Amendment's forbearance from prohibiting private citizen discrimination against homosexuals for public homosexually oriented speech or association is constitutionally nonproblematic because the First Amendment prohibits only *governmental* burdens upon speech and association; it does not command the government to insulate any person from the effects of *private* action resulting from the exercise of free speech or association rights.[8] *See, e.g.,*

---

[8] Furthermore, the Amendment's removal of special protection for homosexuals from the City's official hiring practices is not constitutionally invalid. The Amendment did not *mandate* governmental discrimination against homosexuals in municipal employment but rather merely eliminated the categorical bar embodied in the Equal Employment Opportunity Ordinance which precluded *all* sexual orientation-based employment discrimination by the City in every context. The eradication of this all-encompassing special protection does not remove whatever restraints the Constitution may independently impose upon the City regarding



*United States v. Kokinda*, 497 U.S. 720, 725, 110 S. Ct. 3115, 3119 (1990) (private businesses enjoy absolute freedom from First Amendment constraints); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 1564 (1986) (the First Amendment by its terms applies only to governmental action). Finally, the plaintiffs' right to petition the government for redress of grievances has not been violated, because, as already discussed, gay, lesbian, and/or bisexual access to Council and to other political avenues and fora has not been obstructed.

Because the Amendment implicated no suspect or quasi-suspect class and burdened no fundamental right, the "rational relationship" test (which dictates that the legislation must stand if it is rationally related to any legitimate state interest) is the appropriate standard by which the constitutionality of the Charter Amendment should be judged. *See City of Cleburne, supra.* Under this highly deferential standard, social or economic legislation must be affirmed "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Commission v. Beach Communications, Inc.*, _____ U.S. _____, 113 S. Ct. 2096, 2101 (1993). The party challenging the rationality of legislation bears the burden of negating *every conceivable basis* for the act, regardless of whether or not such supporting rationale was cited by, or actually relied upon by, the promulgating authority.[9] *Id.* at

---

employment practices as related to the exercise of free speech or free association rights, or other constitutional rights, by municipal employees or job applicants. This appellate review need not decide, and therefore does not address, the scope of this constitutional safeguard, if any, in the instant appeal.

[9] Indeed, in the referendum context, it is *impermissible* for the reviewing court to inquire into the possible actual motivations of the electorate in adopting the proposal. *Arthur*, 782 F.2d at 574; *Clarke v. City of Cincinnati*, 40 F.3d 807, 815 (6th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3707 (U.S. March 16, 1995) (No. 94-1536).

2102. In reviewing the justifications for a legislative enactment, the court may not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe by Doe*, _____ U.S. _____, 113 S. Ct. 2637, 2642 (1993), *quoting New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517 (1976) (*per curiam*).

The trial court also erroneously ruled that the Amendment did not rationally relate to any permissible public purpose. *Equality II*, 860 F.Supp. at 440-44. However, to the contrary, the Amendment potentially furthered a litany of valid community interests. It encouraged enhanced associational liberty on the part of Cincinnati residents respecting the sexual orientation issue by eliminating exposure to the punishment mandated by the Human Rights Ordinance against certain persons who elected to disassociate themselves from homosexuals. The Amendment repealed an official municipal policy judgment respecting homosexuality, erstwhile conveyed via the Human Rights Ordinance and the Equal Employment Opportunity Ordinance, thus returning the municipal government to a position of neutrality on the issue.[10] Additionally, the measure reduced governmental regulation of the private social and economic conduct of Cincinnati residents, and augmented the degree of personal autonomy and collective popular sovereignty legally permitted concerning deeply personal choices and beliefs which are necessarily imbued

---

Instead, the court must consider all hypothetical justifications which potentially support the enactment. *Beach Communications, supra.*

[10] Even if the Amendment is construed to reflect the majority's moral views respecting homosexuality, the Supreme Court has dictated such articulations to constitute a legitimate governmental interest. *Bowers*, 478 U.S. at 196, 106 S. Ct. at 2846 (a state criminal sodomy statute is justified as an expression of the belief of the electoral majority that homosexuality is immoral).



with questions of individual conscience, private religious convictions, and other profoundly personal and deeply fundamental moral issues. In turn, this public dichotomy decreased municipal supervision of private conduct, which necessarily may result in some cost savings for the City's taxpayers. These values, and others, were at least arguably advanced by the Amendment, and therefore, irrespective of this court's view of the desirability of the Amendment as a matter of public policy, this court cannot say that the Amendment was not rationally related to a legitimate state objective. Accordingly, it infringes no constitutionally protected right and may stand as enacted.

The lower court also invalidated the Amendment by theorizing that it was unconstitutionally vague, because it affected only special legal protection for "gays, lesbians, and bisexuals," whereas the Human Rights Ordinance had erstwhile protected *all* persons based upon their sexual orientation. The district court found that plaintiff H.O.M.E. and other private employers in the City were confronted by a hiring dilemma as a result of a purported ambiguity inherent in the Amendment. *Equality II*, 860 F.Supp. at 447-49. Initially, it is noted that plaintiff H.O.M.E. is without standing to assert its argument because it has suffered no actual or imminent injury by the implementation of the Amendment, nor do its assertions present a case in controversy. *See Allen v. Wright*, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 3324 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473, 102 S. Ct. 752, 759 (1982). Rather, H.O.M.E. has merely asserted an abstract hypothetical scenario and conjectured that it was unable to determine if the employment of a homosexual, lesbian, or bisexual because of his or her sexual orientation would be civilly or criminally actionable under the Human Rights Ordinance as anti-heterosexual discrimination. Moreover, even if H.O.M.E. had standing below, the vagueness issue has been rendered moot by Council's March 8, 1995 amendment to the Human Rights Ordinance (per Ordinance No.66-1995)

which struck all references to "sexual orientation" from the legislation. At the present time, the City's municipal ordinances provide no protection against private discrimination to any citizen by reason of sexual orientation, irrespective of whether that orientation is heterosexual, homosexual, lesbian, or bisexual. *See, e.g., Mosley v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990).

Accordingly, the judgment below in favor of the plaintiffs is hereby REVERSED, and the district court's permanent injunction against implementation and enforcement of Amendment XII is hereby VACATED. Because the plaintiffs are no longer the prevailing parties in this litigation, the lower court's award of costs (including attorneys' fees) in their favor and against the City is hereby VACATED in its entirety. *Lewis v. Continental Bank Corporation*, 494 U.S. 472, 483, 110 S. Ct. 1249, 1256 (1990); *Clark v. Township of Falls*, 890 F.2d 625, 626-28 (3rd Cir. 1989). This cause is hereby REMANDED to the district court for entry of judgment in favor of the defendants, and for such further necessary and appropriate proceedings and orders as are consistent with this decision.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| EQUALITY FOUNDATION OF GREATER CINCINNATI, INC. et al., | : | C-1-93-773 |
| Plaintiffs, | : | *ORDER ISSUING PERMANENT INJUNCTION* |
| v. | : | |
| THE CITY OF CINCINNATI, | : | |
| Defendant. | : | |

This matter is before the Court for decision following a bench trial conducted on June 20-24, 1994. In rendering our decision on this matter, we have considered the testimony of the witnesses, the documents admitted into evidence, the Intervening Defendants' Proposed Findings of Fact and Conclusions of Law (doc. 59), the Plaintiffs' Proposed Findings of Fact and Conclusions of Law (doc. 60), the Defendant's Post Trial brief (doc. 75), the Intervening Defendants' Supplemental Proposed Findings of Fact and Conclusions of Law (doc. 77), the Plaintiffs' Supplemental Proposed Findings of Fact and Conclusions of Law (doc. 78), and the briefs of Amici Curiae, the Ohio Human Rights Bar Association (doc. 12), the Ohio Psychological Association

(doc. 14), and the Ohio Attorney General's Office (doc. 80).[1]

In weighing the testimony of the witnesses, we considered each witness' relationship to the Plaintiff or to the Defendant; their interest, if any, in the outcome of the trial; their manner of testifying, particularly where they testified in Court; their opportunity to observe or acquire knowledge concerning facts about which they testified; and the extent to which they were supported or contradicted by other credible evidence. Under Fed.R.Civ.P.52, we have set forth our findings of fact and conclusions of law below.

The following decision represents the culmination of at least one phase of an emotional, highly controversial and hotly contested law suit. Both sides have been represented by extremely competent and thoroughly prepared attorneys who presented their respective cases forcefully and persuasively. In light of the nature of this case, it is to their credit that the trial on the merits proceeded in accordance with the highest spirit of cooperation and consideration for each other and the Court. Before rendering our decision, however, we must make a few things clear.

In voiding the Issue 3 Amendment, this Court is in no way giving any group any rights above and beyond those enjoyed by all citizens. To the contrary, we are simply, but

---

[1] Prior to trial this Court considered the Defendant City of Cincinnati's Motion for Summary Judgement (doc. 37), the Intervening Defendant's Motion for Summary Judgment (doc. 41), the Intervening Defendant's Memorandum in Support of its Motion for Summary Judgement (doc. 40), and the Plaintiffs' Memorandum in Opposition (doc. 43). In our Order filed June 3, 1994, this Court denied those motions. See Order Denying Motions for Summary Judgement, Document 52.



crucially, preventing one group of citizens from being deprived of the very rights we all share.

Furthermore, nothing in this Order should be construed in any way as impugning the integrity or motives of those who voted in favor of the passage of the Issue 3 Amendment. Likewise we are not in any way depriving anyone of the right to vote, nor are we undermining the importance of that vote. Rather, this Order merely explores the permissible scope of governmental legislation under the Constitution. And despite the fact that a majority of voters may support a given law, rights protected by the Constitution can never be subordinated to the vote of the majority. While at times this may *seem* unfair, especially when deeply emotional issues are involved, indeed it is the fairest, and most deeply rooted, of all of this Nation[']s rich traditions. It is in this vein that we make the following ruling.

## INTRODUCTION

In 1991 and 1992, by majority vote, the Cincinnati City Council enacted the following ordinances aimed at eradicating certain discriminatory practices within the City of Cincinnati: Cincinnati City Ordinance No. 79-1991 ("Equal Employment Opportunity Ordinance" or "EEO"), and Cincinnati City Ordinance No. 490-1992 ("Human Rights Ordinance" or "HRO").

The EEO prohibits discrimination based upon sexual orientation in city employment and in appointments to city boards and commissions. Discrimination based upon sexual orientation, whether it be heterosexual, gay, lesbian, or bisexual, is prohibited by this ordinance. The EEO also prohibits discrimination based on race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status.

The HRO prohibits discrimination based upon sexual orientation, in the areas of private employment, public

accommodations and housing. Discrimination based upon sexual orientation, whether it be heterosexual, lesbian, gay or bisexual, is prohibited by this ordinance. The Human Rights Ordinance provides exemptions for fraternal and religious organizations and expressly prohibits use of the ordinance to create "affirmative action program eligibility." Like the EEO, the HRO also prohibits discrimination based on race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. The HRO provides civil and criminal penalties for violators of its provisions.[2] It also includes a severability clause.[3]

---

[2] Section 914-9 of the HRO provides in relevant part that if conference and conciliation fails to eliminate the offensive practices, a

> notice of violation and order to cease and desist . . . shall be served on the respondent and complainant, . . . [and if the unlawful discriminatory practice has not been eliminated within 30 days thereof] the Complaint Officer shall take action to refer the matter to the city manager or the city manager's designee for civil or criminal enforcement.

Section 914-11 provides that,

> If after 30 calendar days following service of an order to cease and desist, the respondent has not eliminated or corrected the unlawful discriminatory practice, the Complaint Officer is authorized to impose a fine of $100 per day for each day of substantial non-compliance with the provisions of this chapter, but not to exceed a total of $1000.
>
> The city manager is authorized to institute through the city solicitor in the name of the City of Cincinnati any appropriate civil enforcement proceedings.

Finally, section 914-13 provides that,



Largely in response to the enactment of the HRO, a group of individuals formed an organization called "Take Back Cincinnati," which later changed its name to "Equal Rights Not Special Rights." The group organized for the purpose of gathering the signatures sufficient to place on the ballot at the next general election, a proposed amendment to the Charter of the City of Cincinnati. As a result of their efforts, the proposed charter amendment, which became known as Issue 3, was placed on the November 2, 1993 ballot. Issue 3 provides in full:

ARTICLE XII
NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

---

> Any person who commits an unlawful discriminatory practice under any of the provisions of this chapter and fails to obey any order of the city manager or his duly authorized designee to cease and desist such unlawful discriminatory practice shall be guilty of failure to comply with an unlawful discriminatory practice order, a misdemeanor in the fourth degree.

[3] Section 914-17 provides that the HRO,

> and each section and provision . . . thereunder, are hereby declared to be independent divisions and subdivisions and, notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of said chapter, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such provision to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be valid.

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

The campaign for Issue 3 was waged by its proponents largely on the theme of repealing "special rights" for homosexuals. Issue 3's proponents employed the use of, among other things, mailings, television and radio ads and speeches. The theme of gays as pedophiles and homosexuality as simply a matter of "who one chooses to have sex with"[4] were far from absent from the campaign.

The Plaintiffs[']  campaign was waged with no less vigor, the most notorious aspect being their ubiquitous "Hitler-KKK-McCarthey" billboards appearing throughout the City. After a bitter and often inflammatory campaign, the voters of Cincinnati approved the measure by a vote of approximately 62% to 38%.

On November 8, 1993 the Plaintiffs filed this law suit challenging the constitutionality of Issue 3. The Plaintiffs allege that Issue 3 violates their rights to equal protection, free speech, free association and redress of grievances guaranteed by the First and Fourteenth Amendments to the

---

[4] See Plaintiffs' Exhibit 2, at 10; See also Plaintiffs' Exhibit 27.



United States Constitution. They also claim that Issue 3 is unconstitutionally vague.

With respect to their equal protection claims, they maintain that they belong to a suspect or quasi-suspect class, thus requiring strict or heightened judicial scrutiny of Issue 3. Strict scrutiny is also necessary, according to the Plaintiffs, because Issue 3 violates their constitutional right to equal access to the political process. They further maintain that Issue 3 is unconstitutional under any equal protection standard of review because it is not even rationally related to any legitimate government process. The Plaintiffs have filed this suit under 42 U.S.C. § 1983.

On the other hand, the Defendants maintain that there is no "fundamental right to equal participation in the political process" nor are the Plaintiffs members of a suspect or quasi-suspect group. Thus, they claim, Issue 3 need not be subjected to strict or heightened scrutiny, but rather only rational basis review. The Defendants have presented several governmental interests they claim Issue 3 furthers, and which, they maintain, are sufficient to survive review under any of the equal protection standards.

For example, the Defendants claim that Issue 3 serves the governmental purposes of saving scarce resources and reducing the level of governmental regulation imposed upon the citizenry. They also claim that Issue 3 promotes diversity of thought and allows different groups in the community to hold divergent views on this question by "not imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community."

The Defendants further claim that Issue 3 gives legal effect to Cincinnati's collective notion of morality, and also serves to protect and nurture the nuclear family. Additionally, the Defendants maintain that Issue 3 advances democracy and political integrity by allowing the citizens to

make this important decision for themselves and preserves their ability to define and limit the powers of their elected representatives. Issue 3, the Defendants contend, is simply a legitimate restriction on the scope of the City Council's powers to deal with certain issues of public importance.

Finally, the Defendants claim that Issue 3 does not infringe any First Amendment Rights, nor is it unconstitutionally vague. In short, the Defendants assert that Issue 3 does not impose any impermissible burdens on gays, lesbians and bisexuals.[5]

Following a contested evidentiary hearing, this court issued a preliminary injunction on November 16, 1993 prohibiting the implementation of Issue 3. A written opinion followed on November 19, 1993, *see Equality Found. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993) ("Equality" or "Order"). The findings of fact set out in that opinion are hereby adopted and fully incorporated into this decision. The testimony received in connection with that hearing is also hereby admitted for all purposes in this case.

## THE PARTIES

### The Plaintiffs

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., is an Ohio not-for-profit corporation. Its purpose, as stated in its bylaws, "is the achievement of

---

[5] The Defendants also assert that "Since City Council itself could repeal the Human Rights Ordinance's protection of Homosexuals, the perceived constitutional evil of Issue 3 must be that this same result was obtained through direct democratic action." We disagree with this for at least one reason: it is beyond dispute that Issue 3 is more than a mere repeal measure but blocks all future city coun[cil] legislation on behalf of gays[,] lesbian[s] and bisexual[s].



equality for all individuals. Equality Foundation particularly seeks to promote understanding and education concerning the issues of discrimination and hate against all people and to eliminate bigotry and discrimination against all people through public education and research." Equality Foundation was formed in an effort to oppose discrimination and promote anti-discrimination laws that include protections based upon sexual orientation when the possibility of an anti-gay initiative arose in the summer of 1993. Equality Foundation sued on its own behalf and on behalf of its members.

RICHARD BUCHANAN is a gay man residing in Cincinnati. He is an attorney with a general practice of law. Mr. Buchanan is a registered voter and a political activist who seeks to secure equal rights for lesbians, gay men and bisexuals. He is a former candidate for City Council, a member of the Cincinnati Human Relations Commission, and was a major proponent of the Cincinnati Human Rights Ordinance passed by the Cincinnati City Council in 1992.

CHAD BUSH is a gay man who has a pending charge of discrimination in public accommodations under the Cincinnati Human Rights Ordinance. Mr. Bush received a letter from the City after the passage of Issue 3 stating that it is no longer enforcing the provisions of the Human Rights Ordinance which protect Mr. Bush from discrimination.

EDWIN GREENE is an African-American gay man. He is a registered voter in and a resident of the City of Cincinnati. He alleges that he has suffered discrimination in the past at establishments covered by the Cincinnati Human Rights Ordinance due to his race and sexual orientation and anticipates that he will suffer the indignities of discrimination again at such establishments.

RITA MATHIS is an African-American lesbian who resides in, and is a registered voter in, the City of Cincinnati. Ms. Mathis is a political activist who seeks to secure equal

rights for lesbians, gay men and bisexuals. Ms. Mathis is also a mother who fears that the passage of Issue 3 will stigmatize her child.

ROGER ASTERINO is a gay man employed by the City of Cincinnati. Mr. Asterino has a pending charge of discrimination under the City's Equal Opportunity in Employment Ordinance.

HOUSING OPPORTUNITIES MADE EQUAL (H.O.M.E.) is a civil rights organization with diverse membership including people of all races and sexual orientations. HOME promotes equal housing opportunity for all people in Cincinnati. HOME uses existing fair housing laws including the Cincinnati Human Rights Ordinance to advocate for gay men, lesbians and bisexuals who have been denied equal housing opportunity based upon their sexual orientation. HOME sued on its own behalf and on behalf of its members.

**The Defendants**

The Defendant CITY OF CINCINNATI is a municipal corporation organized and existing under the Constitution and laws of the State of Ohio and exercising the power of home rule pursuant to the Cincinnati City Charter.

The Intervening Defendant Equal Rights Not Special Rights (ERNSR) is an Ohio political organization that promoted and advocated the passage of Issue 3. ERNSR was permitted to intervene, claiming that intervention would ensure a complete defense on all issues.

The Intervening Defendants MARK MILLER, THOMAS E. BRINKMAN, Jr., and ALBERT MOORE are individuals designated as the Committee pursuant to Ohio Election law



to represent the citizens who petitioned to place Issue 3 on the ballot.[6]

**SUMMARY OF TESTIMONY**

The parties in this case presented at trial and through affidavits and depositions, the testimony of a variety of witness[es] ranging from historians, political scientists and psychologists, to experts in the areas of civil rights and municipal law. These witnesses, on the whole, were extremely knowledgeable, well-prepared and credible. Among those who testified in person and via affidavit and/or deposition include, but are not limited to, the following individuals:

Dr. John Gonsiorek, a highly credentialed psychologist. He testified in person at the hearing on the motion for preliminary injunction, and also via deposition which is part of the record in this case. The subject matter of his testimony included, among other things, the psychological impact of discrimination against gays, lesbians and bisexuals on those individuals. He also testified that sexual orientation is an involuntary status, that it sets in at an early age, that it is unamenable to techniques designed to change it (which he described as unethical), and also that sexual orientation is distinct from, and exists wholly independently of, sexual behavior or conduct.

Dr. Gonsiorek also addressed numerous myths and misconceptions about homosexuals particularly those regarding pedophilia. He testified that there is no correlation between a particular orientation and pedophilia, and "that it is

---

[6] The Defendant City of Cincinnati, the Intervening Defendant ERNSR, and the Intervening Defendants Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore, shall be collectively referred to as "Defendants" throughout this opinion.

a myth that gay men molest children more than heterosexuals do." Transcripts of proceeding, Doc. 29(b), at 188. He also testified that there is no meaningful difference between children raised by homosexuals and those raised by heterosexuals, and that children raised by homosexuals were no more likely to be gay or lesbian or be maladjusted. Not only was Dr. Gonsiorek a very competent and credible witness, but his testimony was not seriously refuted by the defense. Significantly, counsel for the Defendants conceded during closing arguments that "your sexual orientation is not something that you choose . . ." See Transcript of Proceedings, Doc. 79 at 11.

The Court also received testimony from Professor George Chauncey, an historian from the University of Chicago, with expertise in social history and the social history of gays and lesbians. Professor Chauncey has impressive credentials in the above areas. He testified via affidavit and deposition.

Professor Chauncey testified extensively regarding the history of discrimination against homosexuals, and how such discrimination was both status and conduct based. He described the pervasiveness of the discrimination, both public and private, and how this anti-gay bias was perpetrated throughout all levels of society and government, from state and local law enforcement activities to a former presidential directive against homosexuals, and the purging of homosexuals from government employment and private employment by government contractors.

He also described how local laws were employed to crush early gay political organization, and how public antipathy and stereotyping was prevalent. He also described the prevalence of anti-gay violence. Professor Chauncey's testimony was not only supported by other evidence in this case, but it too was not seriously contested by the Defendants.



At the trial, John Burlew, an attorney with experience in local politics and a member of the Ohio Civil Rights Commission testified on behalf of the Plaintiffs. He testified as to the importance of political groups forming coalitions in order to obtain favorable legislation. He also stated that groups needing the help of gays, lesbians and bisexuals still refuse to form coalitions with them because of the strong dislike for that group. He stated, among other things, that because of this inability to form coalitions gays, lesbians and bisexuals have a diminished ability to obtain favorable legislation on their behalf. The Court found Mr. Burlew to be very knowledgeable, credible, and informative.

The Court also heard the testimony of Professor Kenneth Sherrill, a Professor of political science at Hunter College in New York City. Professor Sherrill offered his opinion of the relative political power of gays, lesbians and bisexuals. He testified that gays, lesbians and bisexuals experience a striking level of dislike from the population in general. He testified that because of the hatred towards this group it is difficult for them to form political coalitions. He also noted that there are many more anti-gay initiatives than there are initiatives against other groups. In testifying that there was no "gay agenda" that he was aware of, he added that those who organized the "March on Washington" did not represent the mainstream homosexual population.

Professor Sherrill testified that federal, state and local lawmakers have proposed and enacted numerous bills and laws which limit the rights of, and public discussion about, gays[,] lesbians and bisexuals. Professor Sherrill also testified that [] gays earn roughly the same income as that of the average citizen but perhaps a bit less, and that the data collected in the United States Census reports are not entirely anonymous and that this could deter gays, lesbians and bisexuals from answering truthfully.

The Court also received the testimony via deposition of

Darrell Ludlow, a consumer services investigator in the City of Cincinnati's Office of Consumer Services. Mr. Ludlow testified that the inclusion of anti-discrimination provision[s] for gay[s,] lesbian[s] and bisexuals, in the Cincinnati Human Rights Ordinance did not prevent the City from enforcing the Ordinance's protection for other groups. Mr. Ludlow also testified that the Cincinnati Human Rights Ordinance did not require quotas or affirmative action for gay people.

Dr. Marcus Conant, M.D., a physician with a practice specializing in the treatment of AIDS patients, testified on behalf of the Plaintiffs via affidavit. Besides attacking many of the medical assertions found in ERNSR campaign material, he also testified that in his opinion, Issue 3 does not advance any interest in public health and is likely to be counterproductive to efforts to prevent HIV infection and its spread, and to encourage the early diagnosis and treatment of HIV infection.

On the defense side, the Court heard testimony from Dr. Allan C. Carlson, an historian and president of the Rockford Institute, in Rockford, Illinois, an organization which focuses on issues related to culture, social trends and their effects. He testified knowledgeably and credibly regarding the importance of the family, and how the breakdown of the family generally has a detrimental impact on children and society in general. He further testified that where the family unit disintegrates the government generally must step in. This, he testified, is problematic for several reasons, including the fact that it increases government bureaucracy and because the government is not a good substitute for a healthy family unit.

Dr. Carlson also testified that there is no consensus as to the definition of "family" and that numerous definitions exist[]. He acknowledged that gays can be involved in committed relationships and that irresponsible heterosexual behavior was possibly more responsible for the disintegration



of the family than are homosexuals. Similarly, he noted that divorce shatters the family and hurts children.

The Defendants also offered the testimony of Professor Ha[dley] Arkes, a professor of political science and jurisprudence at Amherst College in Massachusetts. He testified with respect to his view of the moral relevance of homosexuality and how it differs from that of race. He also testified, among other things, that the Human Rights Ordinance caused people to draw the inference that homosexuality was not morally wrong, and that Issue 3 allows people to think freely and to choose.

Professor James David Woodward, a professor of political science at Clemson University also testified for the Defendants. Professor Woodward testified with respect to the relative political power of gays, lesbians and bisexuals. It was his conclusion that they are not relatively politically powerless, due in part to their average level of income and education, and the level of intensity that [the] group, although small in number, feels about certain issues. He agreed that coalition building is crucial in the quest for favorable legislation and also that, due to the unpopularity of homosexuals, most groups still resist forming coalitions with them.

The forgoing was a brief summary of the massive amount of evidence that was admitted into the record and represents only a small sample of the testimony provided by the witnesses summarized above.

## FINDINGS OF FACT

1. Homosexuals comprise between 5 and 13% of the population.

2. Sexual orientation is a characteristic which exists separately and independently from sexual conduct or behavior.

3. Sexual orientation is a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and/or the same gender.

5. [sic] Sexual behavior is not necessarily a good predictor of a person's sexual orientation.

6. Gender non-conformity such as cross-dressing is not indicative of homosexuality.

8. [sic] Sexual orientation is set in at a very early age--3 to 5 years--and is not only involuntary, but is unamenable to change.

9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society.

10. There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals.

11. There is no correlation between homosexuality and pedophilia. Homosexuality is not indicative of a tendency towards child molestation.

12. Homosexuality is not a mental illness.

13. Homosexuals have suffered a history of pervasive, irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.

14. Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals.



15. Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic.

16. Gays, lesbians and bisexuals are often the target of violence by heterosexuals due to their sexual orientation.

17. In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless.

18. Coalition building plays a crucial role in a group's ability to obtain legislation in its behalf. Gays, lesbians and bisexuals suffer a serious inability to form coalitions with other groups in pursuit of favorable legislation.

19. No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved.

20. The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible.

21. The inclusion of protection for homosexuals does not detract f[ro]m the City's ability to continue its protection of other groups covered by the City's anti-discrimination provisions.

22. Amending the city charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide

campaign and support of a majority of voters. City Council requires a bare majority to enact or adopt legislation.

23. ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals.[7]

---

[7] References in this opinion to ERNSR campaign materials are not for the purpose of establishing the "intent" of the voters of Cincinnati in voting for Issue 3. *See Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986). Rather, this material simply emphasizes the depth and pervasiveness of the inaccurate and unfounded stereotypes about gays, lesbians and bisexuals in our society.

For example, ERNSR campaign materials and statements addressing the subject incorrectly assumed that gay and lesbian sexual orientation and identity are defined solely by engaging in sexual acts with persons of the same sex. Furthermore, despite the far broader preemptive effect on future legislation, Issue 3 was inaccurately promoted as a simple repeal of "special rights for homosexuals" through the use of television and radio advertisement[s], mailings, and other sources. Some of the material, including the following, made confusing and inaccurate references to the supposed criteria a group must meet to be entitled to anti-discrimination legislation[. S]ome of the material stated that,

> While the United States Constitution and Bill of Rights protects all Americans, civil rights laws have been legislated to provide special protection to certain minorities and groups of individuals. These laws and subsequent Supreme Court decisions have identified three criteria that must be met for a group to qualify for special protection:
>
> 1. A group wanting true minority rights must show that it is discriminated against to the point that its members *cannot earn an average income, get an adequate education or enjoy a fulfilling cultural life.*
> 2. The group must be *clearly identifiable* by unchangeable physical characteristics such as skin color, gender, handicap, age, etc.
> 3. The group must clearly show that it is *politically powerless.*

([italicized] portion in original).



## CONCLUSIONS OF LAW

### I

### THE ISSUE 3 AMENDMENT

### A

The HRO and the EEO are city ordinances, passed by a majority of the members of the City Council. An ordinance, once enacted, may be repealed, subject to the procedures set forth in the City Charter, by a simple majority of City Council members.[8]

---

This excerpt from a campaign pamphlet clearly confuses the criteria supposedly used by the United States Supreme Court in determining what groups have been entitled to suspect or quasi-suspect status (erroneously implying age and disability are among those groups) and identifying those factors as ones also controlling *legislative* decisions on whether a group is entitled to anti-discrimination legislation. Such representations are inaccurate and misleading. Besides various pamphlets like the one above, the "educational" materials disseminated by the proponents of Issue 3 were patently misleading in several respects. For example, the materials repeatedly referred to "special rights" for homosexuals, while it is beyond dispute that the HRO and the EEO only provided homosexuals with the same protection accorded other groups (groups, who, unlike homosexuals, also enjoy such protection, and more, under federal and state law).

[8] An ordinance may also be passed by popular vote through the initiative process. The other form of voter initiated legislation besides the initiative and the charter amendment is the referendum. A referendum is a second way to repeal an ordinance.

Issue 3 is an amendment to the City Charter. The City Charter is the primary governance document of the city, akin to a constitution. 3 James W. Farrell, Ohio Municipal Code § 1.11(a) (11th ed. 1962). Because Issue 3 is an amendment to the City Charter, it becomes part of the city's fundamental law. As such, any and all laws, regulations, ordinances or policies of the City of Cincinnati--with the exception of other charter provisions--are inferior, and any legislation or policy to the contrary is invalid. *Fox v. Lakewood*, 39 Ohio St.3d. 19, 22, 528 N.E.2d 1254 (1988); *Reed v. Youngstown*, 173 Ohio St. 265, 266, 19 0.0.2d 119, 181 N.E.2d 700 (1962); *see*; Charter of the City of Cincinnati, art. I, art. II, §§ 1, 2. The City Charter dictates the scope of the City Council's, and all other city government's authority. *See* Ohio Const. art. XVIII, § 7; see Charter of the City of Cincinnati.

Finally, a provision of the City charter may not be repealed short of amending the charter itself. The charter amendment process, as Guy Guckenberger[9] testified, is a burdensome task that requires a city wide campaign and the support of [a] majority of the voters; it is a far more onerous task than lobbying City Council or [the] city administration for favorable legislation.

Issue 3 provides that the City of Cincinnati, its various boards, and commissions, may not enact, adopt, enforce or administer, any ordinance, regulation, rule or policy which would provide gays, lesbians and bisexuals with any protection or preferential treatment based on their sexual

---

[9] Mr. Guckenberger testified at the preliminary injunction hearing. He was [a] member of the City Council for over twenty years. He left City Council in February of 1992 to assume a position as Hamilton County Commissioner, Hamilton County Ohio. The Court found him to be an extremely knowledgeable and credible witness. *See Equality*, 838 F. Supp. at 1236-38.



orientation, status, conduct or relationship. Nowhere are any of these terms defined, including such broad terms as homosexual "relationship," "conduct" and "status" or "protected status" and "preferential treatment." Furthermore, Issue 3's scope is extremely broad, covering not only the city's legislative arm, but also administration by the city's executive offices; it covers not only laws, but also policies promulgated by the city's various commissions and boards.

We conclude that under the plain language of Issue 3, all existing ordinances, regulations, rules or policies, enacted, adopted, enforced or administered by the city which give gays, lesbians and bisexuals protected status or preferential treatment would be null and void. Thus, Issue 3 would prohibit enforcement of those provisions in the EEO and the HRO which prohibit discrimination against gays, lesbians and bisexuals.

We further conclude, however, that Issue 3 is far more than a mere repeal measure. Because of its status as a charter amendment, the City of Cincinnati, including the City Council and all levels of city administration, would be forever barred from enacting, adopting, administering or enforcing any law or policy on behalf of gays[,] lesbians and bisexuals, now and in the future. This sweeping prohibition would include, but would not be limited to, any anti-discrimination measures on behalf of gays, lesbians and bisexuals, and any city policies or programs specifically benefiting the gay community, no matter what the circumstances, no matter how beneficial to the City of Cincinnati as a whole. No city board or commission could so much as adopt a *policy* on behalf of gays[,] lesbians and bisexuals no matter what the need.

In short, under Issue 3's sweeping, all-encompassing language, the City Council and any and all aspects of city administration would no longer have the power to do anything that could be construed as "protecting" gays, lesbians and bisexuals, or giving them "preferential

treatment." As Mr. Guckenberger stated, under Issue 3, elected city representatives and other city officials would be prevented from enacting, adopting, enforcing, or administering, any ordinance, rule, regulation or policy on behalf of gay, lesbian and bisexual citizens, regardless of merit. *See Equality*, 838 F. Supp. at 1237.

Thus, under its very language, Issue 3 completely excludes an entire group of citizens from all areas of city politics with respect to issues of vast importance to that group. Issue 3 completely cuts-off gay[s], lesbians and bisexuals from the normal and accessible avenues of political action and political participation, and requires them to seek a charter amendment any time they want or require any rule, regulation, ordinance[] or policy on their behalf.

Additionally, in light of the HRO's severability clause, Issue 3 would not disturb the provisions in the HRO prohibiting discrimination against persons based upon race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, marital status or heterosexual orientation, status, relationship or conduct.

Moreover, Issue 3 is contradictory and confusing on its face, because its title indicates its intent to repeal all protections based on sexual orientation, while the body addresses only homosexual orientation. This ambiguity creates confusion as to its scope. Further confusion is generated by its use of, without defining, such broad terms as homosexual, lesbian or bisexual "orientation, status, conduct, or relationship." Absent some guidance with respect to these terms, it is impossible to ascertain exactly what activities are covered by Issue 3 and what [are] not.

Thus, we conclude that, by its very terms, Issue 3 singles out persons of "homosexual, lesbian or bisexual orientation" for unique treatment not imposed upon any other segment of the community. Furthermore, Issue 3 does not target specific issue[s] or types of problems that affect all citizens, nor does



it include all citizens within its restrictions. Rather, Issue 3 targets specific citizens based upon who they are. It removes them from the normal political process and requires them to pursue a more complex, costly and burdensome avenue in pursuit of any rule, regulation, ordinance or policy, on their behalf.

**B**

In light of the forgoing, we make the following rulings regarding the Plaintiffs' constitutional challenges. As noted above, the Plaintiffs claim that Issue 3 violates their right to equal protection of the laws. They claim that Issue 3 violates their fundamental right to equal access to the political process and that they belong to a suspect or quasi-suspect category, thus requiring this Court to subject Issue 3 to strict or heightened scrutiny. At the very least, they claim, Issue 3 is not rationally related to any legitimate governmental purpose. Finally, they argue, Issue 3 violates their First Amendment rights to free speech and association and to petition the government for a redress of grievances, and that Issue 3 is unconstitutionally vague. We address the Plaintiffs' equal protection challenges in Parts II through VI, and their First Amendment and vagueness challenges in Part VII of this Order.

**II**

**CONSTITUTIONAL STANDARDS OF REVIEW UNDER THE EQUAL PROTECTION CLAUSE**

It is well established that there are three standards of review a Court may apply in reviewing a challenge under the equal protection clause: strict scrutiny, intermediate scrutiny, and rational basis review. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Legislation that infringes a fundamental right or a suspect category must be examined under the strict scrutiny standard of review. *See Id.* Under

strict scrutiny, the law must be narrowly tailored to serve a compelling governmental interest in order to withstand the constitutional attack. *Id.* Under intermediate scrutiny, the law must be substantially related to an important governmental interest. *Id.* at 441, 105 S.Ct. at 3255. Finally, under rational basis review, the law must be rationally related to a legitimate governmental purpose. *Id.* at 440, 105 S.Ct. at 3254.

## III

## FUNDAMENTAL RIGHTS

### A

The Plaintiffs claim that Issue 3 violates their Fundamental Right to equal participation in the political process. While we addressed this issue in the context of the Plaintiffs' Motion for Preliminary Injunction, we now conclude as a matter of law, for the reasons stated in our earlier order, that Issue 3 violates the Plaintiffs' [f]undamental [r]ight to [e]qual access to the political process. *See Equality Found. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D.Ohio 1993); *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 419 (1993). Consequently, any legislation that disadvantages an independently identifiable group of people by making it more difficult for that group to enact legislation in its behalf, "fences" that group out of the political process, and thereby violates their fundamental rights. *See Equality*, 838 F.Supp. at 1238-42; *Evans*, 854 P.2d at 1282.

The Defendants have raised a number of arguments regarding our analysis in that Order. While we disagree with the Defendants' objections, their position is far from untenable. It is therefore important to address their objections in this order.



The Defendants claim that a number of the cases we relied upon, specifically, *Hunter v. Erickson*, 393 U.S. 385 (1969), *Gordon v. Lance*, 403 U.S. 1 (1971), and *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982), do *not* support the principle that a state may not disadvantage *any* independently identifiable group by making it more difficult for that group to obtain legislation on its behalf.[10] Rather, the Defendants argue that the doctrine enunciated in *Hunter*, and explored in subsequent cases, involves only the well established principle that legislative classifications involving suspect categories, like race, must be strictly scrutinized.

The Defendants also claim that if the court adopts the fundamental rights theory enunciated in *Equality* and *Romer*, no issue could be relegated to the charter amendment process. According to the Defendants, all charter amendments disadvantage some "identifiable group." That "identifiable group" consists of the supporters of the issue for which the charter amendment is required. The group would be disadvantaged, like the Plaintiffs in this case, because by requiring a charter amendment, the supporters could no longer appeal directly to the City Council for legislation. Thus, the argument goes, *all* issues requiring a charter amendment would be unconstitutional under the fundamental rights theory enunciated in *Equality* and *Romer*. For the following reasons, we decline to retreat from our analysis in *Equality*. *See Equality*, 838 F. Supp. at 1238-42.

---

[10] In *Hunter* the Supreme Court invalidated an Akron, Ohio city charter amendment passed by a majority of the voters providing that city council could implement no ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. 393 U.S. 385. In *Gordon*, the Court upheld a state's constitutional and statutory mandates requiring approval of 60% of the voters before increasing bonded indebtedness. 403 U.S. 1. In *Washington*, the Court invalidated a statewide initiative which terminated the use of mandatory busing for the purpose of racial integration. 458 U.S. 457.

First, it is clear that the analysis in *Hunter* goes beyond a routine application of the principle that racial classifications must be strictly scrutinized. For example, the Court exhibits something of a dual analysis, at times emphasizing the purely racial aspect of the legislation involved, while at others focusing on the legislation's impact on the political process. *See Hunter v. Erickson*, 393 U.S. 385, 391, 391-92, 392-93 (1969). Furthermore, the Court observed in unmistakably race-neutral terms, that "the State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give *any group* a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393 (citations omitted) (emphasis added).

It is also significant that in analyzing the political participation aspect of the case, the *Hunter* Court relied exclusively on voting cases which had nothing to do with any racial classification. *See Hunter*, 393 U.S. at 393 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964) (invalidating Alabama reapportionment plan which effectively impaired certain citizens' right to vote) and *Avery v. Midland County*, 390 U.S. 474 (1968) (striking down apportionment plan creating disparity in the weight of residents' votes)). This reliance on race-neutral cases contrasts sharply with the traditional race and ancestry cases the Court relied upon in the suspect category portion of its discussion. *See id.* at 391-92. It is thus clear that, despite the Defendants' urging, something more unique was going on than the straight-forward strict scrutiny/racial classification analysis so deeply entrenched in our jurisprudence.[11]

---

[11] It is also noteworthy that the *Washington* Court made reference to the "Hunter Doctrine." 458 U.S. at 473. If *Hunter* were merely a race case, the "*Hunter* doctrine" would have to refer to the well-established principle that racial classifications must be strictly scrutinized. Clearly that principle is not known as the "Hunter Doctrine."



Additionally, if the constitutional defects in *Hunter*, and *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982), were simply the legislative racial classifications, there would have been no need for the Court to stray from the traditional strict scrutiny analysis, and analyze the legislation's impact on the political landscape as it pertained to any group. *See Kramer v. Union Free School Dist.*, 395 U.S. 621, 628 n.9 (1969) ("[o]f course, we have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation"). It is therefore, not at all surprising that the Court in *Gordon v. Lance*, 403 U.S. 1 (1971), a case not involving race, distinguished *Hunter not* on the grounds that *Hunter* was simply a race case requiring strict scrutiny while *Gordon* was not, but rather on the basis that *Gordon* involved no "independently identifiable group or category" at all. *Equality Found. v. City of Cincinnati*, 838 F.Supp. 1235, 1241, 1241 n.2 (S.D.Ohio 1993); *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S.Ct. 419 (1993); *See Gordon*, 403 U.S. at 5, 7. Thus, unlike in *Hunter*, the *Gordon* Court observed, the legislation involved was constitutional because the Court could

> discern no *independently identifiable group or category* that favors bonded indebtedness over other forms of financing.

*Gordon v. Lance*, 403 U.S. 1, 5 (1971) (emphasis added). On the other hand, where state or local constitutional or charter "provisions . . . discriminate against or authorize discrimination against *any identifiable class* they . . . violate the Equal Protection Clause." *Id.* at 7 (emphasis added) (footnote omitted).

Similarly, in *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982), the Supreme Court gave no more than a passing nod to the traditional strict scrutiny/suspect category analysis, let alone apply it in spite of the racial classification in that case. *See Id.* at 485. It can thus *not* be said that *Washington*

is simply a race case. Rather the Court's holding rested on the principle that legislation which fails to "allocate governmental power on the basis of any general principle[]" intrudes upon the Equal Protection Clause. *See id.* at 470 (citing *Hunter*, 393 U.S. at 395 (Harlan, J., concurring))

Furthermore, the *Washington* Court speaks in general, race-neutral terms with respect to the right to be free from a discriminatory political landscape. For example, the Court noted that the Fourteenth Amendment "reaches a political structure" that "distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Washington*, 458 U.S. at 467. The Court also reaffirmed the *Hunter* Court's pronouncement that "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another." *Id.* at 468 (emphasis added by *Washington* Court) (quoting *Hunter*, 393 U.S. at 393).

Finally, the *Washington* Court concluded that,

> laws structuring political institutions or allocating political power according to "neutral principles"--such as the executive veto, or the typically burdensome requirements for amending state constitutions--are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U.S at 394. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they provide[] a just framework within which the "diverse political groups in our society may fairly compete." *Id.* at 393. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action.



*Washington*, 458 U.S. at 470 (emphasis in original). But, when the state fails to "allocate governmental power on the basis of general principles," and thereby "disadvantages" some "independently identifiable group or category" by making it more difficult for that group or category [] "to enact legislation in its behalf," the legislative provision in question must be strictly scrutinized. *See Hunter*, 393 U.S. at 393; *Gordon*, 403 U.S. at 5, 7; *Washington*, 458 U.S. at 470, 476-77.

In support of their argument that the defining factor in these cases was the racial aspect, or lack thereof, the Defendants note that *Washington* "is rife with references to *Hunter*, but one is hard-pressed to find a citation to that case that does not simultaneously tie it to the racial classification involved." See Intervening Defendants' Proposed Findings of Fact and Conclusion of Law, Doc. 59, at 50-51 n. 7. While this is true, we find it far from dispositive. Where a statute infringes a fundamental right by placing a limitation on that right on the basis of race, the statute may have multiple constitutional defects. Thus, it is not at all surprising that a case discussing a constitutional right will speak of that right in race-specific terms if the legislation under review *also* draws a racial classification. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating Virginia miscegenation law not only on the basis of its racial classification, but *also* because it violated Due Process Clause). Therefore, while we agree that *Hunter* and *Washington* are "rife" with reference[s] to race, we do not agree that it necessarily follows that *Hunter*, *Washington* or their progeny are "race cases" and nothing more.

It is also significant that the Supreme Court in both *Hunter* and *Washington*, equated the constitutional defects in those cases to the violation of an individual's or a group's right to vote. *Hunter* 393 U.S. at 391, 393 (legislation's constitutional defect was no more permissible than "dilut[ing] any person's vote or giv[ing] any group a smaller representation than another of comparable size");

*Washington*, 458 U.S. at 476 (same). Thus, the constitutional violations in *Hunter* and *Washington* were of the same order as those discussed in, for example, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating law requiring children or property ownership as precondition to vote); *Avery v. Midland County*, 390 U.S. 474 (1968) (striking down apportionment plan creating disparity in the weight of residents' votes); *Carrington v. Rash*, 380 U.S. 89 (1965) (invalidating law requiring civilian status to vote); *Reynolds v. Sims*, 377 U.S. 533 (1964) (invalidating Alabama reapportionment plan which effectively impaired certain citizens' right to vote). If such Issue 3-type charter amendments are tantamount to a denial of the right to vote, such charter amendments must be constitutional[l]y infirm when they target *any* individual or group, including gays, lesbians and bisexuals.

Consequently, restructuring the political process in such a way as to make it more difficult for any "independently identifiable group," including gays[,] lesbians and bisexuals, "to enact legislation on its behalf" is no more permissible tha[n] it is to "dilute any person's vote or give any group a smaller representation than another o[f] comparable size." *See Hunter*, 393 U.S. at 391, 393; *Washington*, 458 U.S. at 470, 476.

We therefore conclude that *Hunter* and its progeny did not rest simply on whether the legislation drew a racial classification. Rather these case[s] involved the infringement of rights so central to our political process, rights tantamount to the right to vote, that legislation infringing those rights must be strictly scrutinized regardless of whether any racial classification is involved.

**B**

To single out a group of citizens and place upon them [an] added and virtually insurmountable burden in their pursuit of protection from majority discrimination thoroughly



undermines the spirit of our constitution. In our great society we adhere to the "self evident" truth that all people are created equal. And while we may disagree, and often will, such political contest is an expected and normal byproduct of a diverse and healthy democracy. This political process remains healthy and robust, however, only when all individuals are allowed to compete on an equal footing.

For these very reasons, a state may not single out and disadvantage any *independently* identifiable group by making it more difficult for that group to enact legislation in its behalf; and so doing does not "demonstrate [a] devotion to democracy" *James v. Valtierra*, 402 U.S. 137, 141 (1971), but rather makes a mockery of it. Allowing the majority to prohibit a small, unpopular group of citizens from obtaining favorable legislation unless they request it directly from the very majority that deprived them [of] access to the legislature in the first place, violates even rudimentary notion[s] of fundamental fairness, and undermines the integrity of our nation. No more fundamental a notion exi[s]ts than that which dictates that all citizens shall have the right to *try* to obtain legislation on their behalf on an equal footing with others. Because Issue 3 contravenes these fundamental notions, it is repugnant to the Constitution, and cannot stand.

Based on the record, we conclude that under the Issue 3 Amendment, all citizens, with the exception of gay[s], lesbian[s] and bisexuals, have the right to appeal directly to the city council for legislation, while only members of the Plaintiffs' independently identifiable group must proceed via the exceptionally arduous and costly route of amending the City Charter before they may obtain any legislation bearing on their sexual orientation. Thus, Issue 3 "fences out" *see Carrington v. Rash*, 380 U.S. 89, 94 (1965), an independently identifiable group of citizens--gays, lesbians and bisexuals--from the political process by unfairly burdening their quest for favorable legislation, regulation and policy. Issue 3, therefore, denies that group an "effective voice in the governmental affairs which substantially affect

their lives." *See Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Equality*, 838 F. Supp. at 1241.

We therefore conclude that Issue 3 implicates the Plaintiffs' [f]undamental [r]ight to equal participation in the political process by singling out and disadvantaging an independently identifiable group of citizens--gays, lesbians and bisexuals--by making it more difficult for that group to enact legislation in its behalf. The City may no more do that, than it may dilute *any* person[']s vote, or give *any* group a smaller representation than another of comparable size. As we conclude that Issue 3 implicates a [f]undamental [r]ight, it must be narrowly tailored to serve a compelling state interest or it must fall.[12]

---

[12] The Defendants have expressed their concern that *any* group who supports a given issue for which a charter amendment is required would be an "identifiable group." Thus, they claim, the Court's holdings will "invalidate virtually every charter amendment and referendum, as virtually all legislation adversely affects [identifiable] groups" who will suffer "an inability to lobby the City Council to reverse the results of the public referendum." We agree that any time a group supports an issue for which a charter amendment must be obtained that group is "identifiable" and is in fact "disadvantaged" in the manner that the Defendants describe. However, the difference between an "independently identifiable group" and an "identifiable group" is that where the factor identifying the group transcends the mere support for any given issue, the group is "independently identifiable" within the context of *Gordon*, and *Hunter*. Thus, in *Gordon*, the fact that no "*independently* identifiable group favored bonded indebtedness," saved the provision, although clearly an *identifiable* group favored bonded indebtedness--namely, all of those individuals who *favored* bonded indebtedness. *See Gordon*, 403 U.S. 1.

Thus, the difference between an identifiable group, and an *independently* identifiable group is that the defining characteristic of an independently identifiable group transcends the mere support for a single political issue, such as race, gender or sexual orientation.



## IV

## HEIGHTENED SCRUTINY

### A

The Plaintiffs also claim that gays[,] lesbians and bisexuals should be classified as a suspect or quasi-suspect class. As such, according to the Plaintiffs, the Court should subject Issue 3 to strict or heightened scrutiny. As noted above, under strict scrutiny the challenged law must be narrowly tailored to serve a compelling governmental interest. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Under heightened scrutiny the law must be substantially related to an important governmental purpose. *Id.* at 441.

Although the Supreme Court has never articulated a precise test for determining which groups should be regarded as suspect or quasi-suspect, the Court has repeatedly considered a number of factors. For example, the Court has considered whether the group's defining characteristic is immutable. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).[13] The Court has also considered whether the group

---

On the other hand, a group whose sole identifying characteristic is that group's support for a single[] issue is merely an identifiable group. Thus, contrary to the Defendants' concerns, our holding will not jeopardize the entire charter amendment process. Indeed, the Court has clearly upheld the constitutionality of the charter amendment process. *See Gordon*, 403 U.S. 1 (1971) and *James v. Valtierra*, 402 U.S. 137 (1971). It should also be noted that the "simple repeal or modification of. . .antidiscrimination laws, without more, . . ." is not unconstitutional. *Washington*, 458 U.S. at 483 (internal quotation omitted); *Hunter*, 393 U.S. at 390 n.5.

[13] We recognize that the Supreme Court has demonstrated some skepticism as to the relevance of the immutability factor. *Cleburne*, 473 U.S. at 442-43 n.10.

has suffered a history of discrimination, *Frontiero*, 411 U.S. at 684-85; *Cleburne*, 473 U.S. at 441; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), "*or* [if the group has been] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Ind. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (emphasis added).[14]

Evidently the most decisive factors the Supreme Court has considered, however, are whether the group's defining characteristic is at all related to its members' ability to participate in or contribute to society, *Cleburne*, 473 U.S. at 441, 442, 443, 444; *Frontiero*, 411 U.S. at 686; *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Murgia*, 427 U.S. at 310-11, 315; *see Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), and whether the characteristic is beyond the individual's control. *Cleburne*, 473 U.S. at 441 (quoting *Lucas*, 427 U.S. at 505); *Frontiero*, 411 U.S. at 686; *Plyler*, 457 U.S. at 217 n.14 (1982) ("[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish").

Thus, in observing that gender-based legislation must be subjected to heightened scrutiny, the Supreme Court observed, what "differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . *is that the sex characteristic frequently bears no relation to ability to perform or contribute to society*." *Cleburne*, 473 U.S. at

---

[14] On at least two occasions, in determining what standard of equal protection review was appropriate, the Supreme Court noted the complex and specialized nature of the legislation and the judiciary's lack of competence to review it. Thus, the Court has at least suggested this as another relevant consideration. *See Rodriguez*, 411 U.S. at 40-43; *Cleburne*, 473 U.S. at 442-3.



440-41 (emphasis added) (quoting *Frontiero*, 411 U.S. at 686). Similarly, "[b]ecause illegitimacy is beyond the individual's control and *'bears no relation to the individual's ability to participate in and contribute to society,'* . . " any legislative distinction based on that characteristic must also be subjected to heightened scrutiny. *Cleburne*, 473 U.S. at 441 (emphasis added) (quoting *Lucas*, 427 U.S. at 505).

On the contrary, where a characteristic indeed has a direct bearing on the individual's ability to function in society, the Court has declined to grant the class suspect or quasi-suspect status. For example, in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the Supreme Court was called upon to consider an equal protection challenge to a Massachusetts statute requiring mandatory retirement for uniformed police officers at the age of 50. The rationale for mandatory retirement was "to protect the public by assuring physical preparedness of its uniformed police." *Id.* at 314 (footnote omitted).

The Court applied the rational basis test and found the statute did not violate the Equal Protection Clause. In declining to apply a heightened level of scrutiny, the court emphasized that "there is a general relationship between advancing age and decreasing physical ability . . . ." *Id.* at 310-11 (internal quotations omitted); *see id.* at 314-15, 314-15 n.7. The court further observed that,

> [w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike say, those who have been discriminated against on the basis of race or national origin, have not experienced a *history of purposeful unequal treatment* or been subjected to unique disabilities *on the basis of stereotyped characteristics not truly indicative of their abilities.*

*Id.* at 313 (internal quotations omitted) (emphasis added); *Cleburne*, 473 U.S. at 441.

Similarly, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the Court was called upon to determine whether the mentally retarded should be granted quasi-suspect status. The Court observed that quasi-suspect status has been reserved for those groups whose defining characteristic is beyond the individual's control and bears no relation to the individual's ability to perform or to participate in, or contribute to, society. *See Id.* at 440-441 (citing *Frontiero*, 411 U.S. at 686 and *Lucas*, 427 U.S. at 505). In concluding that the Court of Appeals had erred in holding mental retardation a quasi-suspect classification, the Supreme Court repeatedly emphasized the fact that the mentally retarded have "a reduced ability to cope with and function in the everyday world." *Id.* at 442; *see id.* at 443, 444.

Thus, while mental retardation is immutable and beyond the individual's control, there is indeed, as the Court found, an "undeniable" relationship between mental retardation and the individual's abilities. *Id.* at 442, 444. Legislation bearing on mental retardation, therefore is not presumptively invalid:

> Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded [beyond merely prohibiting discrimination against them], we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

*Cleburne*, 473 U.S. at 446.

Thus, where the characteristic, like race, gender, illegitimacy or national origin, is determined by causes beyond the individual's control and bears no relation to the individual's ability to perform or to participate in, or contribute to, society and especially where the class has



suffered a history of discrimination based on stereotyped notions of that characteristic, any legislation resting on such an irrelevant characteristic likely reflects nothing more than invidious stereotypes beyond the scope of any permissible governmental purpose.[15] While most legislation enjoys a presumption of constitutionality, *Heller v. Doe*, ___ U.S. ___, ___, 113 S.Ct. 2637, 2643 (1993), legislation based on invidious criteria is not entitled to that presumption and must be carefully scrutinized by the judiciary.

Thus in determining whether this Court should find that gays[,] lesbians and bisexuals constitute a quasi-suspect class mandating heightened scrutiny of any legislation drawing a distinction based on sexual orientation, the court must consider:

> (1) whether an individual's sexual orientation bears any relationship to his or her ability to perform, or to participate in, or contribute to, society;
> (2) whether the members of the group have any control over their sexual orientation;
> (3) whether sexual orientation is an immutable characteristic;
> (4) whether that group has suffered a history of discrimination based on their sexual orientation; and
> (5) whether the class is "politically powerless."

Based on the record before the Court and our careful reading of the case law in this area, we conclude that sexual orientation is a quasi-suspect classification. Therefore, laws drawing a distinction based on that characteristic must be substantially related to a sufficiently important governmental purpose.

---

[15] Thus, the Supreme Court has noted, "[s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

**B**

**1**

First, we conclude that gays, lesbians and bisexuals have suffered a history of invidious discrimination based on their sexual orientation. This is not a unique conclusion. *See High Tech Gays v. Defense Indus. Sec. Clearance Office.*, 895 F.2d 563, 573 (9th Cir. 1990); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1324 n.7 (E.D.Cal. 1993); *see also, Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *cert.*). Gays, lesbians and bisexuals have been stigmatized throughout history based on erroneous stereotypes and mischaracterizations regarding their sexual orientation. Gays, for example, have been characterized as effeminate mental defects with a proclivity towards pedophilia, and a host of other deviant sexual practices.[16] Gays have been subjected to pervasive private discrimination as well as public discrimination on the local, state and federal levels.

Furthermore, homosexuality was long considered a mental illness--a notion since discarded by the medical community--amenable to aversion therapy, and other "treatments" now considered ineffective and unethical. Gays have been black listed and rooted out of government service and subjected to arrest and censorship and much more over the years. We conclude that it is a matter of fact beyond dispute that gays, lesbians and bisexuals have suffered a history of discrimination based on inaccurate, stereotyped notions of their sexual orientation.

---

[16] In fact ERNSR campaign literature accused homosexuals of habitually engaging in a wide range of activities, some of which allegedly involve the use of rodents, fists, and other objects. These inflammatory assertions were thoroughly rebutted by the Plaintiffs' expert, Dr. Conant.



**2**

We also conclude that sexual orientation, whether hetero[,] homo-, or bisexual, bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society. *See Cammermeyer v. Aspin*, 850 F. Supp. 910, 922 (W.D. Wash. 1994) ("there is no study showing [homosexuals] to be less capable or more prone to misconduct." "[F]emale homosexual[s] in the Navy [are] hardworking, career-oriented, willing to put in long hours on the job and among the command's top professionals"). Indeed the American Psychological Association has so concluded, and no evidence was produced remotely indicating otherwise. If homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of "staying in the Closet" and of "coming out" would not exist; their impediment would betray their status.

**3 & 4**

Furthermore, we conclude that homo-, hetero-, and bisexual orientation is a characteristic beyond the control of the individual. Credible and unrebutted testimony established that sexual orientation sets in at an early age, around 3-5 years, and is simply a matter of development beyond that stage. Furthermore, evidence amply established, and we conclude, that there is a broad distinction between sexual orientation, and sexual conduct. *See, e.g., Cammermeyer*, 850 F. Supp. at 919-19 ("[p]laintiff has also provided the Court with substantial uncontroverted evidence that a distinction between homosexual orientation and homosexual conduct is well grounded in fact"). Sexual orientation, as Dr. Gonsiorek put it, "is a predisposition toward erotic, sexual, affiliation or affection relationship towards one's own and/or the other gender," and is not simply defined by any conduct. See Transcripts of Proceedings, Doc. 29(b), at 173-174. In fact, evidence demonstrated that sexual activity is not even necessarily a good predictor of one's sexual orientation.

Thus, while sexual conduct may be a matter of volition, sexual orientation is not. Sexual orientation is therefore not simply a matter of who one *chooses* to have sex with, but rather is a much deeper, more complex and involuntary state of being. We therefore conclude that sexual orientation is a characteristic not only beyond the control of the individual, but also one existing independently of any conduct that the individual, hetero-, homo- or bisexual, may choose to engage in. Furthermore, relevant and credible evidence revealed that sexual orientation is unamenable to techniques designed to change it, and that such techniques are considered unethical.

**5**

Finally, to the extent it is relevant, we conclude that Plaintiffs, while not a wholly politically powerless group, do suffer significant political impediments.[17] First, while the

---

[17] Throughout this litigation much attention has been focused on whether gays[,] lesbians and bisexuals are "politically powerless." While we recognize that the Supreme Court has touched upon this variable in several cases, it is by no means the controlling criteria in determining suspect or quasi-suspect status. Because, the "Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility[,]" *Plyler v. Doe*, 457 U.S. 202, 245 (1982) (Burger, C.J., dissenting), whether a class is labeled "suspect" or "quasi-suspect" should not be controlled by, nor do we think the Supreme Court has ever held that it is controlled by, a group's ability to pass or fail some ill-defined political power test.

Additionally, relative political power cannot even be a particularly weighty factor, let alone a controlling one. For example, it cannot be said that males, as a group, have been relegated to such a position of political powerlessness as to require special judicial protection. Nonetheless, laws differentiating between the sexes which disadvantage males as well as females, must be subjected to heightened scrutiny. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982); *Craig v. Boren*, 429 U.S. 190, 204 (1976).



---

Thus, the fact that gender is beyond the individual's control and is generally totally irrelevant must be far more controlling than any political power analysis. Similarly, if political power were the overriding factor, political gains by women and racial minorities could threaten their protected status.

Furthermore, the only cases this Court is aware of that gives some semblance of guidance as to what even constitutes a groups's relative political power are *Frontiero*, 411 U.S. 677 and *Cleburne*, 473 U.S. 432. In neither case did the Court explore whether the group involved had the ability to form coalitions or to what extent they contributed money to PACs. In *Frontiero*, for example, the Court noted the absence of women in this country's "decisionmaking councils." 411 U.S. at 686, 686 n.17.

In *Cleburne*, the Court reviewed legislation designed to benefit the mentally retarded, noting that much state and federal legislation went beyond merely prohibiting discrimination against that group. *Cleburne*, 473 U.S. at 443-45. The thrust of that analysis was not to explore the political power of the group as such, but rather to underline the error in the view that laws drawing a distinction on mental ability should be *presumed* invidious and therefore unconstitutional. The Court observed that in fact the opposite was true: "[I]n the vast majority of situations" the legislative response to the plight of the mentally retarded, both federal and state, has been both "legitimate [and] . . . desirable." *Id.* at 444. In order for a law to be subject to heightened scrutiny, it must have lost the general presumption that it is rational and legitimate. In the case of the mentally retarded, the "vast majority" of laws dealing with that group benefit them, going beyond merely prohibiting discrimination. The Court also discussed how mental retardation bore on an individual's abilities and was a legitim[ate] subject of legislation. It therefore defies logic and experience to *presume* that a law based on that criteria is unconstitutional.

Furthermore, in most cases the Supreme Court has no more than made passing reference to the "political power" factor without ever actually analyzing it. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1,

evidence as to whether gays, lesbians and bisexuals earn an income or have an educational level above that of the average American was inconclusive, evidence indicated that homosexuals earn an income roughly equal to that of the national average. Similarly, the amount of money spent on political action committees ("PACs") was also inconclusive. Much of the difficulty in compiling this data appears to stem from the reluctance of gays to risk exposure by responding to questions and identifying themselves as gay, lesbian or bisexual. In fact, it is this factor which undermines the validity of the generally reliable United States Census report in this area for, as testimony established, the Census is not wholly anonymous. It is therefore not possible for the Court to determine the extent of the financial resources available to gays[,] lesbians and bisexuals as a group, and to what extent that money is dedicated to obtaining political results.[18]

On the other hand, undisputed evidence was offered demonstrating that gays, lesbians and bisexuals are confronted with distinct obstacles in the political arena. Testimony from both the Defendants' and the Plaintiffs' witness[es] demonstrated that it is crucial for political minorities to form coalitions in order to achieve legislative success. All groups are a minority on specific issues, and thus all groups must form coalitions in order to obtain beneficial legislation. As a result, groups that normally do not agree must get together to form coalitions. Evidence

---

28 (1973). Thus, while these Courts have given the test differing degrees of attention, one thing is apparent to this Court: the significance of the test pales in comparison to the question of whether or not the characteristic bears any relationship to the individual's ability to function in society, whether the group has suffered a history of discrimination based on misconceptions of that factor and whether that factor is the product of the group's own volition.

[18] There was also conflicting testimony on the ultimate impact PAC money has on lawmakers' actual votes.



revealed that even those groups that need the help of gays, lesbians and bisexuals refuse to form coalitions with them because of their strong feeling of dislike for these groups. For these reasons, gay political power is seriously curtailed.

It is also significant that of 38 Issue 3-type ballot initiative campaigns waged in communities across the country, 34 were approved by the voters. According to one witness, the four that were not approved, simply "went beyond the pale" as far as their discriminatory effect on gays, lesbians and bisexuals. This not only bespeaks the level of hostility towards gays, but also the fact that whatever political gains they have made are in peril. Thus, whatever bonafide legislative victories gays, lesbians and bisexual[s] may have achieved in recent years, those victories are being "rolled back" at an unprecedented rate and in an unprecedented manner.[19]

Furthermore, openly gay, lesbian and bisexual individuals are almost entirely absent from the "Nation's decisionmaking councils" as were women at the time of the *Frontiero* decision. *See Frontiero*, 411 U.S. at 686 n.17.[20] We thus conclude, to the extent that it is relevant to a group's suspect-or quasi-suspect status, gays, lesbians and bisexuals do not enjoy that type of legislative success, political representation, or political alliance[] building capability necessary to be considered a politically powerful group.

---

[19] Indeed, Mr. Guckenberger testified at the hearing on the motion for preliminary injunction, that he knew of no other time in the history of the City of Cincinnati when such a charter amendment was enacted. See *Equality*, 838 F. Sup at 1238.

[20] According to the Plaintiffs' statistics, there are 497,155 elected officials in the United States. There are no openly gay or lesbian United States Senators; 2 openly gay members of the House of Representatives; 12 of the 7,461 state legislators are openly gay; of the total of 497,155 elected officials in the United States, a total of 73 are openly gay.

## C

Finally, we acknowledge that numerous Courts of Appeals have ruled on the issue of whether sexual orientation should be accorded suspect or quasi-suspect status, and all have decided in the negative. We disagree, however, with the fundamental underpinning of those decisions--that homosexuality is a status defined by conduct--and therefore decline to follow their reasoning.

Several of these cases based their decision not to grant suspect or quasi-suspect status to homosexuals on the conclusion that *Bowers v. Hardwick*, 478 U.S. 186 (1986), posed an "insurmountable barrier[]" to such a holding. *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987). In *Bowers*, the Supreme Court held that laws criminalizing homosexual sodomy did not run afoul of the Due Process Clause because there is no fundamental right to engage in homosexual sodomy. *Bowers*, 478 U.S. at 191-192.

In light of *Bowers*, the D.C. Circuit concluded that,

> [i]t would be quite anomalous, on its face, to declare *status defined by conduct* that states may constitutionally criminalize as deserving of strict [or heightened] scrutiny under the equal protection clause. More importantly, in all those cases in which the Supreme Court has accorded suspect or quasi-suspect status to a class, the Court's holding was predicated on an unarticulated, but necessarily implicit, notion that it is plainly unjustifiable (in accordance with standards not altogether clear to us) to discriminate invidiously against the particular class. . . . If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the *behavior that defines the class*, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.



*Padula*, 822 F.2d at 103 (citations omitted) (emphasis added); *accord High Tech Gays v. Defense Indus. Sec. Clearance Office.*, 895 F.2d 563, 571-72 n.6, 573-74 (9th Cir. 1990) (emphasis added) (homosexuality is "*behavioral* and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes . . . . The *behavior or conduct* of such already recognized classes is irrelevant to their identification"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir 1989), *cert. denied*, 494 U.S. 1003 (1990) (homosexuals held not suspect or quasi-suspect class because "[t]he *conduct or behavior* of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups" whereas "homosexuality is primarily *behavioral* in nature") (emphasis added); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-465 (7th Cir. 1989), *cert. denied, Ben-Shalom v. Stone*, 1004 (1990) ("[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes"). Because we expressly reject the notion that homosexual orientation is "defined by" any conduct, we decline to adopt the reasoning of these courts.[21]

Rather, as discussed above, we conclude that sexual orientation, whether homosexual or heterosexual, exists

---

[21] Although several other cases pre-dated *Bowers*, they based their decision not to grant quasi-suspect status to homosexuals on essentially the same point we reject. *See Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc) ("[b]ecause . . . homosexual conduct is not a constitutionally protected liberty interest . . . we refuse to hold[] that homosexuals constitute a suspect or quasi-suspect classification"); *National Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by equally divided Court*, 470 U.S. 903 (1985)("[w]e cannot find that a classification based on the choice of sexual partners is suspect"); *Rich v. Secretary of Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (same).

independently of any conduct. Consequently, neither *Bowers*, nor the reasoning of *High Tech Gays, Woodward, Padula, Ben-Shalom*, nor any of the other cases similarly ruling, is controlling. *Bowers*, therefore, does not preclude a finding that gays, lesbians and bisexuals constitute a quasi-suspect class.

Accordingly, based on the forgoing, we conclude that gays, lesbians and bisexuals meet the requisite criteria for quasi-suspect status. Thus, laws drawing a distinction based on sexual orientation must be subjected to intermediate scrutiny. Issue 3 therefore, must be substantially tailored to a sufficiently important governmental interest or it is unconstitutional.

## V

## RATIONAL BASIS

The Plaintiffs also assert that under the rational basis test, Issue 3 must be declared unconstitutional. For the reasons that follow, we agree. "The equal protection clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr, Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Furthermore, while under the rational basis test, the courts must accord legislatures great deference, and in fact the legislature is presumed to have acted constitutionally, *Heller v. Doe*, ___ U.S. ___, ___, 113 S.Ct. 2637, 2643 (1993), "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446, (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) and *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973)); *Bannum. Inc. v. City of Louisville*, 958 F.2d 1354, 1360 (6th Cir. 1992). Therefore, although a



classification must be upheld under the rational basis standard if there is any reasonably conceivable state of facts that could provide a rational basis for the classification, "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller*, ___ U.S. at ___, 113 S.Ct. at 2643.

Therefore, "some objectives--such as a bare . . . desire to harm a politically unpopular group--are not legitimate state interests." *Cleburne*, 473 U.S. at 446-47 (internal quotation and citation omitted); *Moreno*, 413 U.S. at 534. Consequently, "mere negative attitudes, or fear," of a given group, will not suffice as a legitimate governmental purpose. *Cleburne*, 473 U.S. at 439. Finally, while the Constitution cannot control private prejudice[s], "neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, *directly or indirectly*, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (emphasis added).

After carefully considering the asserted governmental interests articulated by the Defendants, and any other possible justifications, we conclude that Issue 3 is not rationally related to any legitimate governmental purpose. Thus, Issue 3 runs afoul of the Equal Protection Clause.

## VI

## ANALYSIS

The Defendants have identified several governmental purposes which they claim to be, at minimum, legitimate, and to which Issue 3 is rationally related. First, the Defendants claim that the government always has an interest in not imposing regulations upon private citizens. Thus, the argument goes, by removing regulations that would give the Plaintiffs any kind of protected status, Issue 3 serves the purpose of not regulating private conduct any more than necessary.

Second, the Defendants claim[] that Issue 3 serves the legitimate governmental purpose of saving scarce resources, both public and private. Third, the Defendants urge that Issue 3 serves the purpose of "not imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community." Thus, according to the Defendants, "by refraining from dictating one government-mandated view concerning the relevance of sexual orientation, Issue 3 promotes diversity by allowing different groups in the community to hold divergent views on this question."

Fourth, the Defendants claim that Issue 3 gives legal effect to Cincinnati's collective notion of morality. The Defendants also claim that Issue 3 serves the purpose of protecting and nurturing the nuclear family. Finally the Defendants maintain that Issue 3 advances democracy and political integrity by allowing the citizens to make this important decision for themselves and preserving their ability to define and limit the powers of their elected representatives.

**A**

**1 & 2**

Assuming *arguendo* that the governmental interests in saving resources and minimizing governmental regulation are legitimate governmental interests, in this case they are not sufficient to justify Issue 3's sweeping prohibitions. First, evidence was offered demonstrating that any money and resources that might be saved by Issue 3's elimination of any and all laws prohibiting discrimination against homosexuals, would be, at best, *de minimis*. Testimony established that time and resources allocated to the sexual orientation provision of the HRO and the EEO is not only minimal but that it does not diminish the City's capacity to enforce existing anti-discrimination provisions regarding the traditional suspect and quasi-suspect classifications (as well



as the non-traditional classifications protected by the HRO and the EEO such as Appalachian origin, marital status and heterosexual orientation).

Similarly, evidence established that the inclusion in the EEO and the HRO of the sexual orientation provision would not require the expenditure of additional funds, nor require additional staff or resources. Additionally, one credible witness testified that Issue 3 could even cost the city scarce resources by barring Cincinnati's eligibility for certain types of state and federal programs.

Furthermore, the elimination of the sexual orientation provisions of the HRO and the EEO would not reduce regulation more than a negligible amount at best, because of the existing regulations in the HRO and the EEO, including those regulations pertaining to race, gender, heterosexual orientation, Appalachian origin and marital status. Thus, Issue 3's broad prohibition of all gay rights legislation is too attenuated to these asserted interests. Thus, Issue 3's distinction is arbitrary and irrational. *See Cleburne*, 473 U.S. at 446.

Consequently, under strict or heightened scrutiny, the asserted goal must also fail. Even assuming that some savings could be derived if sexual orientation were not included in the HRO and EEO, a simple repeal could have accomplished this goal. Therefore, the asserted governmental interest of reducing regulation and saving resources is neither narrowly tailored, nor, substantially related to either a compelling or sufficiently important governmental purpose.

**3**

Furthermore, the Defendants assert that Issue 3 serves the significant governmental interest of promoting the "nuclear family." While this asserted goal is certainly an honorable one, we conclude that it is not sufficiently related to Issue 3's universal, prospective ban on all legislation and policy

prohibiting discrimination against gays, lesbians and bisexuals to pass constitutional muster.

First, as the Defendants own witness testified, there is no consensus as to a definition of "family" and that more than one definition exists. Furthermore, testimony from both the Plaintiffs' and Defendants' witnesses established that heterosexual males are far more responsible than gays in this society for the break down of the family unit. According to the evidence, this is due, at least in part, to the increased illegitimacy rate and the failure of heterosexual males to remain with the mother and care for, and help raise their children. Furthermore, testimony from both sides demonstrated that divorce is also a great factor contributing to the breakdown of the "nuclear family." Nonetheless, the EEO and HRO continue to prevent discrimination on the basis of marital status.

Additionally, no evidence was produced to explain how Issue 3 could protect the "nuclear family." In fact, the best explanation offered by the Defendants' witness was that Issue 3 would preserve the "potential" for passing laws that could benefit the family. We are, however, unaware of how *allowing* the City Council to prohibit discrimination against gays, lesbians and bisexuals undermines the family or prevents the enactment of "pro-family" legislation. As the trial court in *Evans v. Romer* observed, "[s]eemingly, if one wished to promote family values, action would be taken that is pro-family, rather than anti some other group." 1993 WL 518586, *8 (Colo. Dist. Ct. Dec. 14, 1993). Thus, removing gays from the list of groups protected from discrimination and barring passage of any such legislation in the future, is simply too remote from the accomplishment of the asserted goal of nurturing the "nuclear family" to give Issue 3 so[] much as a rational basis. *See Cleburne*, 473 U.S. at 446.





The Defendants also argue that Issue 3 serves the purpose of "not imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community" and thereby promotes diversity of views on this question. We disagree. In fact, we conclude that Issue 3 accomplishes exactly the opposite.

While the mere absence of a law prohibiting discrimination on the basis of sexual orientation could arguably reflect governmental neutrality on the issue, Issue 3 is an affirmative statement to the City Council and city administration, and to all of the citizens of Cincinnati, that discrimination against homosexuals shall be permitted, and in all likelihood, shall never be prohibited no matter what the circumstances. In fact, Issue 3, as a provision of the Cincinnati City Charter, makes the statement "homosexuality is wrong" one of the city's fundamental tenets. Such a governmental edict has the precise effect of "imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community." Thus, by its very terms, not only is Issue 3 not rationally related to the asserted governmental interest[] of promoting diversity of views on this topic, but it utterly frustrates it.

Furthermore, anti-discrimination legislation does not impose a point of view upon the community, but rather affects behavior. Thus, a law prohibiting discrimination based on sexual orientation neither requires anyone to *think* a certain way, nor adopt a given point of view about the moral relevance of homosexuality. Rather, it simply affects conduct the same way laws prohibiting discrimination against any other group affects conduct (but not beliefs). Additionally, the enactment of laws preventing discrimination against a particular group in private employment and housing, does not interfere with any individual's constitutional rights regarding personal relationships. *See Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

There is, therefore, absolutely no relationship between Issue 3's universal prospective ban on the passage of anti-discrimination laws and the asserted governmental purpose of promoting diversity of views and preventing the imposition of a uniform doctrinal view on all segments of the community. Issue 3 is not only too attenuated from that asserted goal, but it achieves the opposite effect.

**5**

Similarly, the Defendants claim that Issue 3 gives effect to Cincinnati's collective notion of morality. While this alone is not necessarily an illegitimate governmental purpose, *see Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), it cannot simply be a surrogate for the majority's desire to discriminate against an unpopular minority group. *See Cleburne*, 473 U.S. at 446-47. "[M]ere negative attitudes, or fear," of a given group, will not suffice as a legitimate governmental purpose. *See Id.* at 448.

According to Mark McNeil, coordinator of the Issue 3 campaign, ERNSR's own polls showed that Cincinnati's voters did not understand the language of Issue 3. Furthermore defense witnesses expressed varying, and at times inconsistent, views as to its scope. Thus, considering the confusing language of Issue 3, its uncertain, although clearly sweeping scope, and the lack of any legislative history, it is simply impossible to ascertain what, if any, collective notion of morality Cincinnati has. Furthermore, in light of the grossly inaccurate campaign ads and other materials available to the voters through the media, mailings, and other sources, it is impossible to know exactly what the voters intended to vote for.[22] It is thus impossible to know

[22] For example, the Defendants consistently portrayed Issue 3 as a mere repeal measure which all parties concede it is not. Furthermore, what was ostensibly being repealed were "special rights" for gays which that group has theoretically received *over and above* those enjoyed by other groups. In fact many other non-traditionally suspect groups enjoy not only local, but federal and state protections beyond those given to gays.



what, if any, Cincinnati's "collective notion of morality" is. This asserted purpose is likewise insufficient to justify Issue 3.

**B**

Furthermore, the very structure of Issue 3, its sweeping scope, and its distinct focus on prospectively barring any *anti-discrimination* legislation, policy or regulation, on behalf of gays, lesbians and bisexuals bespeaks [its] "bare. . . desire to harm a politically unpopular group . . . ." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original); *Cleburne*, 473 U.S. at 446-47. Such an objective can never "constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. 528 at 534 (emphasis in original); *Cleburne*, 473 U.S. at 446-47.

It is true that legitimate governmental purposes can, and have been, articulated in support of Issue 3. However, we can conceive of no legitimate governmental purpose *rationally related* to a law which prohibits a minority group from *ever* obtaining anti-discrimination legislation on its behalf, unless it undertakes the massive and unmitigated--and likely insurmountable--burden of amending the city charter. Such a law implies nothing more than a "bare desire to harm an unpopular group" based on who the members of that group are. The purpose not only to permit discrimination, but also to encourage it, is inherent in the very concept of such a law. As such it is constitutionally defective. *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 446-47.

**C**

Finally, Issue 3, far from demonstrating governmental neutrality on the issue of homosexuality, in fact, gives effect to private prejudice. This, the constitution will not tolerate. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). As mentioned above, Issue 3 singles out gays, lesbians and bisexuals and prospectively and universally bars the passage of any and all laws or policies falling within the virtually boundless definition of "protective legislation" or "preferential treatment" for those citizens.

Such a strong message from the government, embodied in the City's fundamental law, effectively places the government's imprimatur on those acts of private bias carried out pursuant to Issue 3's unmistakable mission. Were the government silent on this issue, it could be argued that the government were neutral. Issue 3, however, is not mere governmental silence; it is an affirmative declaration that gays, lesbians and bisexuals are unworthy of protection, now and in the future. It is a declaration that discrimination against them is permissible, and that if they suffer discrimination at the hands of the majority, it is from the majority itself that they must seek help.

Thus, while the Constitution cannot control private prejudices, "neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, *directly or indirectly*, give them effect." *Palmore*, 466 U.S. at 433 (emphasis added). In light of our conclusion regarding Issue 3's sweeping scope, we find that Issue 3 indeed gives effect, at the very least indirectly, to private prejudice. It is therefore constitutionally defective.

We therefore conclude that Issue 3 is unconstitutional under even the most deferential standard of review, let alone the most exacting.

## VII

## FIRST AMENDMENT AND VAGUENESS CLAIMS



The Plaintiffs have also made a number of claims based on the First Amendment. Additionally, the Plaintiffs argue that Issue 3 is unconstitutionally vague. First, the Plaintiffs claim that Issue 3 infringes their First Amendment rights to free speech and association. The Plaintiffs also claim that Issue 3 infringes their First Amendment right to petition the Government for a redress of grievances. For the following reason[s], we agree.

### A

### Free Speech and Association

The First Amendment provides that Congress "shall make no law . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. "[F]reedom of speech. . . [is] among the most fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by the States." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (footnote omitted); *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

"The First Amendment was 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Meyer*, 486 U.S. at 421 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). Thus, "[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill*, 310 U.S. at 101-02 (footnote omitted); *Meyer*, 486 U.S. at 420. Additionally, "'statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed.'" *Meyer*, 486 U.S. at 420 (quoting *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983)). Finally, "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations

that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

First, as we have stated, Issue 3 not only repeals the existing prohibition against discrimination against gays, lesbians and bisexuals, but it is undisputed that it forever bars City Council from ever enacting any law[,] policy[,] regulation [or] ordinance of any kind that would protect gays from discrimination, no matter what the need, no matter how exigent the circumstances. Thus, as we found in *Equality*, Issue 3[] eviscerates the very purpose of gays, lesbians and bisexuals, or their organizations, lobbying or petitioning City Council or [the] city administration, or attempting to gain access to those bodies. 838 F.Supp. at 1238. Consequently, there is a significant deterrent for gays, lesbians and bisexuals to get involved in political activities of major importance to the group.

Furthermore, again, as we noted in *Equality*,

> not only will gay, lesbian and bisexual citizens be virtually unable to obtain legislation for their group no matter how great the need, but also their advocacy may expose them to discrimination for which they will have no recourse even remotely comparable to that of other groups, to obtain protection, thereby increasing the risks of, and consequently chilling, such expression.

*Id.* at 1242 (footnote omitted). Clearly, forcing this group to attempt to obtain favorable legislation through the costly and burdensome charter amendment process, with its attendant risk of exposing them to virtually unremediable discrimination, will deter open discourse on the matter and chill expression and association of groups dedicated to bringing about such results. See *Id.* at 1242 n.5.

In light of the for[e]going, we conclude that Issue 3 will hinder the "unfettered interchange of ideas for the bringing



about of political and social change[] . . . ." *Roth*, 354 U.S. at 484; *Meyer*, 486 U.S. at 421. Furthermore, because Issue 3 imposes upon the Plaintiffs the added burden of attempting to amend the charter every time they seek legislation, Issue 3 unquestionably limits the power of that group to initiate legislation and therefore must be closely scrutinized and narrowly construed. *See Meyer*, 486 U.S. at 420.

This does not mean that gays, lesbians and bisexuals are entitled to *successful* lobb[y]ing for favorable legislation. There is however, an undeniable and singular deterrent from joining groups, speaking out, or lobbying for, or advocating, the adoption of favorable policy or legislation, or supporting groups or candidates that support certain political beliefs. As such Issue 3 clearly "limit[s] the power of the people to initiate legislation . . . " and must face exacting scrutiny. *Meyer*, 486 U.S. at 420 (internal quotation omitted).

Furthermore, because the charter amendment process is so much more onerous than lobbying City Council for legislation, gays will be virtually guaranteed that they will not be successful. While this alone may not be sufficient to render Issue 3 unconstitutional, and while gays, lesbians and bisexuals are not *entitled* to anti-discrimination legislation, there is an added factor which renders it violative of the First Amendment.

Issue 3 differs inherently from issues which may properly be relegated to the charter amendment process. As discussed above, Issue 3 bars City Council and [the] city administration from enacting any legislation or policy on behalf of gays, lesbians and bisexuals including anti-discrimination legislation. In order to obtain such legislation, gays, lesbians and bisexuals must seek a charter amendment. Unlike neutral issues which may permissibly be relegated to the initiative process,[23] unsuccessful proponents of a "repeal

---

[23] *See, e.g., Gordon v. Lance*, 403 U.S. 1 (1971).

issue 3" campaign, through their political efforts, will open themselves to the risk of government condoned employment and housing discrimination for which all future avenues of recourse will be closed. An unsuccessful proponent of some neutral issue which must be approved by charter amendment, on the other hand, does not run the risk of suffering discrimination in employment and housing for taking part in, or supporting, that issue. Rather he or she simply risks a political disappointment on that single issue.

Thus, the consequences of attempting to supersede Issue 3 are prohibitive of any attempt to do so, carrying with defeat--a likely consequence due to the Plaintiffs' numerical inferiority and unpopularity--the exorbitant risk of employment and housing discrimination. The social and political stakes associated with requiring an unpopular group to seek anti-discrimination legislation from the majority, therefore, are unique and patently unfair. Such a situation will chill political expression in a way and to a degree not inherent in other subjects properly relegated to the initiative process. This will have the "inevitable effect of reducing the total quantum of speech on a public issue[,]" *Meyer*, 486 U.S. at 423, and will deter political association in violation of the First Amendment. *See Equality*, 838 F. Supp. at 1242, 1242 n.5.

It is also noteworthy that in *Meyer*, the "Appellants argue[ed] that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain[ed] open to appellees . . . . " *Meyer*, 486 U.S. at 424. The Court held that the mere fact that other avenues of expression were available did not remedy the Constitutional defects of the statute because the statute restricted access to the most effective and perhaps the most economic avenue of political discourse. *Id.* Thus in *Meyer*, the fact that the statute left open the more burdensome avenues did not relieve the pressure on protected First Amendment expression. *Id.*



In this case, not only is the cost of the charter amendment process incomparably higher and the effort incomparably more onerous, but the political and personal consequences are far higher than merely lobbying the City Council, although political success even at the City Council level is not guaranteed. But similar to the principles enunciated in *Meyer*, the fact that a far more onerous avenue remains open to the Plaintiffs, does not neutralize Issue 3's constitutional defects. *see Meyer*, 486 U.S. at 424. Thus, Issue 3's enormous deterrent effect on political speech and association. renders it unconstitutional.

**B**

**Redress**

The Plaintiffs also claim that Issue 3 infringes the Plaintiffs' First Amendment Right to petition the government for redress of grievances. First, it is beyond dispute that under Issue 3 the Plaintiffs would be left without the option of lobbying City Council for legislation on their behalf. The Defendants argue, however, that the Plaintiffs still have the option of amending the city charter. This alternative, the Defendants claim, is nothing short of what the Defendants did in enacting Issue 3 in the first place. We find this argument unpersuasive. For the following reasons we conclude that Issue 3 deprives the Plaintiffs of their rights to petition the government for redress of grievances.

A party seeking to amend the Cincinnati City Charter, as a general rule, has two options. Under the Ohio Constitution, proposed

> [a]mendments to any charter . . . may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed

amendment, shall be submitted by such legislative authority.

Ohio Const. art. XVIII, §9. Thus, as a general rule, those seeking to amend the Cincinnati city charter have two alternatives. They may seek a two thirds vote of the City Council to pass an "ordinance of submission" submitting a proposed charter amendment to the electorate. *See State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 497, 502 (1941); *State ex rel. Citizens v. Widman*, 66 Ohio App. 3d 286, 288 (1990). They may also attempt to obtain sufficient signatures from the electorate, which, after submission to the City Council, may also be submitted to the electorate. These two alternatives are wholly separate, *see Bigelow*, 138 Ohio St. at 502; *Widman*, 66 Ohio App. 3d at 288, and are the only two avenues available for amending the city charter. In the second scenario, a writ of mandamus may issue compelling the city Council to submit the proposal to the electorate if the City Council abuses its discretion in declining do so. *Bigelow*[,] 138 Ohio St. at 503, 540.

If the Plaintiffs chose to pursue the first option, they would have to petition the City Council to propose and adopt by a two-thirds vote, and "provide by ordinance," a proposed charter amendment repealing Issue 3 and reinstating employment and housing protection for gays, lesbians and bisexuals. *See Widman*, 66 Ohio App. 3d 286, 288 (1990); *Bigelow*, 138 Ohio St. at 502. Such City Council action, we conclude, falls within Issue 3's sweeping restrictions on City Council's authority in this area. This avenue would require the City Council, with the help of the voters, to give homosexuals protected status or preferential treatment. Furthermore, even if the proposed charter were never approved, the enactment of such an ordinance by 2/3 of the City Council clearly bespeaks a favorable "policy" with respect to homosexuality. Thus, Issue 3's preemptive breadth cuts off yet another avenue of redress for the Plaintiffs which is available to all other citizens.



Under the second alternative, the Plaintiffs may present to the City Council a petition signed by ten per cent of the voters. The Defendants argue that Issue 3 would not prohibit the Plaintiffs from proceeding in this manner, because the City Council's role in such situations is purely ministerial. However, under this alternative, it is still the responsibility of the City Council to "provide by ordinance" the proposal to the electors. *Blackwell v. Bachrach*, 166 Ohio St. [301], 306 [(1957)]; *Widman*, 66 Ohio App. 3d at 288.

Moreover, while it appears that the City Council's role in this regard *is* ministerial, *see Widman*, 66 Ohio App. 3d. at 291, our reading of Issue 3 reveals no exceptions for even purely ministerial functions which would consist of enacting an ordinance which would have the ultimate effect of providing gays, lesbians and bisexuals with protected status or preferential treatment. This option, as well, would not be available to the Plaintiffs under Issue 3.

Additionally, even if this one avenue remained open to the Plaintiffs, that alone would not be enough to cure Issue 3's constitutional defects. First, if Issue 3 did not prohibit City Council action under the second option, in the event that the City Council erroneously interpreted Issue 3's broad language as prohibiting such action, the Plaintiffs would be required to seek a writ of mandamus. *See Bigelow* 138 Ohio St. at 503, 540, 37 N.E. 2d 41. Even assuming the writ issued in such a case, the Plaintiffs would have been required to tackle yet another resource consuming hurdle in an already arduous process.

Furthermore, even if this path were open to the Plaintiffs, this is clearly the narrowest, and most burdensome path to take in pursuing legislation. Thus, not only would the right to directly petition the City Council be cut off from the Plaintiffs, but so would at least one of the two avenues of the charter amendment process. While it is uncertain exactly what effects [I]ssue 3 would have on the second charter amendment alternative, it is clear that even if that single path

remained unobstructed, the Plaintiffs would be acutely deprived of their right to petition the government for a redress of grievances.

Finally, because Issue 3 bars direct City Council legislation as well as the first of the two charter amendment options, with only the second of the two charter amendment options even arguably left open, Issue 3's chilling effect is drastically intensified. Consequently, we conclude that Issue 3 violates the Plaintiffs' First Amendment rights to free speech and association, and to petition the government for a redress of grievances.[24]

## C

## Vagueness

The Plaintiffs also allege that Issue 3 is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment because its effect, particularly on the Human Rights Ordinance, is unclear. Legislation must be sufficiently clear to satisfy the constitutional requirements of due process. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

As the *Grayned* Court observed, vague laws are offensive for several reasons, first,

> because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

*Grayned*, 408 U.S. at 108 (footnotes omitted); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982); *Springfield Armory, Inc. v. City of Columbus*, Nos. 92-4126/4223 slip. op. at 2 (6th Cir. July 11, 1994) [29 F.3d 250, 251-52]; *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1399 (6th Cir. 1987). Additionally, where a vague statute touches upon "sensitive areas of basic First Amendment freedoms," it operates to inhibit the exercise of those freedoms. *Grayned*, 408 U.S. at 109 (internal quotation omitted). Similarly, as the Sixth Circuit observed just weeks ago, when "criminal penalties are at stake, as they are in the present case, a relatively strict test is warranted." *Springfiel Armory*, slip. op. at 3 [29 F.3d at 253] (citing *Hoffman Estates*, 455 U.S. at 499).

Confusion surrounding Issue 3's scope and impact was abundant at trial and otherwise on the record. In fact, the Defendants' own witnesses offered differing views regarding Issue 3's scope. For example, Chris Finney, an attorney who drafted Issue 3, admitted testifying at deposition that Issue 3 would void the entire HRO. At trial, he maintained that it would remove the sexual orientation provision from the ordinance. Mark McNeil, coordinator for the Issue 3 campaign, on the other hand, testified that Issue 3 did not remove "sexual orientation" from the HRO but removed only protections for lesbians, gay men and bisexuals.

It is not surprising that the intervening Defendants offered conflicting interpretations of Issue 3's effect, at times arguing that Issue 3 removes all sexual orientation-based protections and at other times urging that Issue 3 draws a distinction between protections available to gays, lesbians and bisexuals

---

[24] Such added obstacles to the political process bolsters this Court's conclusion that Issue 3 unconstitutionally "fences out" the Plaintiffs from the political process. See Part III, above.

and those available to heterosexuals. On its very face, Issue 3 lends itself to contradictory interpretations.

First, its title suggests an interpretation of its scope which would extend to all laws granting protections based on sexual orientation, whether homosexual or heterosexual. The body of Issue 3, however, indicates that existing sexual orientation provisions are still in effect with regard to heterosexuals. Further ambiguities are found in its reference to homosexual "orientation, status, conduct or relationship" without ever offering a definition of such terms which could unquestionably cover a remarkably broad field of activities.

In fact, evidence in this case has established that the Plaintiff, H.O.M.E., and other employers subject to the HRO, will be unable to determine what effect Issue 3 will have on the HRO. Because the ordinance contains civil and criminal penalties for non-compliance, Issue 3 exposes H.O.M.E. and other employers to criminal penalties without fairly apprising them of its impact on their employment obligations. For example, H.O.M.E. does not know whether it can hire a lesbian over a heterosexual person solely on the basis of sexual orientation, or whether it will face a civil and criminal penalty for doing so. Such agencies and other employers and property owners are vulnerable to penalties despite good faith efforts to comply with the law.

Furthermore, in *Grayned*, the Court observed that vague statutes "inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." 408 U.S. at 109 (citations and internal quotations omitted). If Issue 3 does not prohibit discrimination based on heterosexual orientation or conduct, those who steer clear of such lawful conduct by so discriminating, have a more restrictive life imposed upon them than the law requires, due to the law's own ambiguities. If Issue 3 does prohibit such discrimination, as noted above, those who are not put on proper notice risk criminal penalties without fair warning. We find that Issue 3



does not give employers, landlords and others fair notice as to whether heterosexuals are protected against discrimination based on sexual "orientation, status, relationship or conduct."

Issue 3 can also lead to discriminatory enforcement. In *Grayned*, the court stated, "[a] vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." 408 U.S. at 108-09 (footnote omitted). Issue 3 does not provide the city with "explicit standards for those who apply" it. *Id.* at 108. With the ambiguous scope of Issue 3, decisions to enforce the HRO with respect to heterosexuals only may be conducted on an *ad hoc* basis. While Issue 3 obviously sweeps broadly, its full impact is uncertain. As a result, the citizens affected by this legislation are left vulnerable to discriminatory enforcement.

Finally, the void-for-vagueness doctrine also relates to legislation that limits conduct protected by the First Amendment. Indeed, where "the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (footnote omitted). Issue 3 clearly involves rights associated with free speech and association as discussed above. And because the full extent of Issue 3's scope is unclear, citizens, are likely to be discouraged from engaging in expressive and associational activities to obtain passage of legislation, due to the uncertainty of Issue 3's broad, yet ill-defined scope. Issue 3, therefore, is unconstitutionally vague.

## CONCLUSION

This has been an extremely profound and controversial case. The Court has endeavored to thoroughly address and analyze each of the claims and assertions advanced by the parties. In light of the length of our opinion, we have

summarized below our conclusions set forth in detail in the for[e]going opinion.

We conclude that Issue 3 indeed infringes the Plaintiffs' fundamental right to equal access to the political process. As such, this Court was obligated to subject Issue 3 to strict scrutiny review. We also hold that gays, lesbians and bisexuals belong to a quasi-suspect category, thus requiring the application of heightened scrutiny analysis to Issue 3. Based on the record and our analysis of the case law, we find that under strict or heightened scrutiny as well as under rational basis review, Issue 3 was insufficiently linked to any governmental interest to pass constitutional muster.

With respect to the Plaintiffs' First Amendment claims, we hold that Issue 3 violates the Plaintiffs' First Amendment rights to free speech and association, and to petition the government for a redress of grievances. Finally, we hold that Issue 3 is unconstitutionally vague.

Accordingly, for the forgoing reasons, we GRANT the Plaintiffs['] request for a permanent injunction, and hereby PERMANENTLY ENJOIN the implementation and enforcement of the proposed charter amendment known as Article XII or Issue 3.

SO ORDERED.

Dated August 9, 1994

S. Arthur Spiegel
United States District Judge



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| EQUALITY FOUNDATION OF GREATER CINCINNATI, INC. et al., | : | C-1-93-773 |
| Plaintiffs, | : | *ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION* |
| v. | : | |
| THE CITY OF CINCINNATI, Defendant. | : | |

This matter is before the Court on the Plaintiffs' Motion for Preliminary Injunction (doc. 2), the Defendant's Memorandum in Opposition (doc. 5), the Plaintiffs' Reply Memorandum (doc. 7), the Plaintiffs' Proposed Findings of Fact and Conclusions of Law (doc. 9), Brief of *Amicus Curiae* of Ohio Human Rights Bar (doc. 12), the Defendant's Proposed Findings of Fact and Conclusions of Law (doc. 13), Brief of *Amici Curiae* Ohio Sociological Foundation (doc. 14), and the Plaintiffs' Supplemental Reply (doc. 15). A hearing was held on this matter on November 15, 1993.

## INTRODUCTION

We announced on November 16, 1993, our intention of granting the Plaintiffs' Motion for Preliminary Injunction. We emphasize that we are sensitive to the concerns of the people who voted in favor of the passage of the Issue 3 Amendment. It is of paramount concern to the Court that all effected by this Order have an understanding of the role of the Court in this case. The Court is in no way granting special rights to any individual or group, nor is it usurping

the democratic process. On the contrary, an essential principal of our system of government is that fundamental constitutional rights are not subject to popular vote. Thus, it is one of the most important roles of the federal courts to ensure that the constitutional rights of the few or the powerless are not infringed because their views are unpopular with the majority. Without these principals, and without the independence of the federal courts to preserve them, ours would not be a democracy at all but rather a tyranny at the whim of the majority.

## PROCEDURAL BACKGROUND

The Plaintiffs in this case have filed a motion seeking a preliminary injunction prohibiting the implementation of the Issue 3 Amendment to the Cincinnati City Charter. Accordingly, we will analyze the issues before the Court under the appropriate four part test discussed below.

## FACTUAL BACKGROUND

This action challenges the constitutionality of Article XII of the Cincinnati City Charter, passed by the voters on November 2, 1993. The Plaintiffs allege that the amendment violates their rights of equal protection, free speech, and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution and by the Constitution of the State of Ohio.

The amendment, titled Issue 3 on the ballot ("Issue 3" or the "Issue 3 Amendment"), provides:

ARTICLE XII
NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or



> administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

The Charter of the City of Cincinnati is akin to a local constitution. It is the primary governance document in the city. Generally, local laws must comply with the Charter. Policy in the Cincinnati City Government is set by a nine member City Council which is elected at large every two years; the council candidate receiving the highest vote is also elected Mayor.

Guy Guckenberger was a Republican council member for over twenty years. He left the Council in February, 1992 to assume a position as a Hamilton County Commissioner. Mr. Guckenberger testified for the Plaintiffs at the hearing and the Court found him to be a credible and informative witness. He explained that City Council not only passes laws but also does a great deal of constituent work, assisting citizens in their efforts to have particular problems addressed by the City administration. While the day-to-day administration of the City government is left to a professional city manager, the City Council enacts ordinances and sets policy for the city manager and City administration and also has the responsibility and authority to hire and fire the manager.

Mr. Guckenberger explained that council members have many particular constituencies within the Cincinnati electorate such as environmental groups, the AFL-CIO, and Stonewall--a political advocacy group for lesbians and gays.

The determination of the competing needs and demands of various groups is accomplished by private meetings with citizens as well as through special public hearings and through the weekly council committee meetings.

Mr. Guckenberger and plaintiff Richard Buchanan, also a credible witness, traced the political development of the gay citizens of Cincinnati. In 1983, Stonewall Cincinnati first endorsed City Council candidates, although many of the candidates refused to accept the endorsement.

Over the years, the gay and lesbian issues pursued through City Council Members included alleged harassment of gays by police in the City Parks, a dispute with the Civil Service Commission regarding the questions on sexual orientation and sexual history for police and fire recruits, and the City EEO ordinance and what eventually became the Human Rights Ordinance.

Mr. Guckenberger noted that although the gay and lesbian political voice was getting stronger over the last decade, many individuals would nonetheless introduce themselves at gay functions by first name only and otherwise indicate that they were not yet ready to declare themselves openly gay.

The Plaintiffs also provided testimony to the effect that the political history of lesbians, gays and bisexuals in Cincinnati is an indication that they are an identifiable group. For example, George Chauncey, an historian at the University of Chicago, stated in his affidavit that there is a well-documented history of discrimination in the United States against gay men, lesbians and bisexuals as a result of their sexual orientation. This discrimination has included status-or identity-based discrimination as well as conduct-based discrimination. Many laws have been passed that have been specifically targeted at and/or selectively enforced against gay men, lesbians and bisexuals.



Furthermore, we found credible the testimony of Plaintiff Roger Asterino who testified at the hearing. He, along with Plaintiff Edwin Greene who testified via affidavit, related their experiences as gay men. Rita Mathis, another credible witness who also testified at the hearing, told of her experience as a lesbian. The testimony of these witnesses included accounts of the discrimination they have experienced because of their sexual orientation. According to their testimony, they experience, among other things, fear of rejection by family and friends, fear of reprisal and violence and harassment in housing and employment.

Dr. Gonsiorek, a highly credentialed psychologist, testified credibly that the experiences of these plaintiffs were typical of the experiences of discrimination of lesbians, gay men and bisexuals. Dr. Gonsiorek showed that lesbians, gay men and bisexuals are an identifiable class because of their shared sexual orientation toward people of the same gender and their shared history of discrimination on the basis of their sexual orientation.

Plaintiff Mr. Asterino, who is 42, testified that he knew by an early age that he was gay and that he prayed to change. He was reluctant to "come out" to his family and co-workers and "came out" only this year to fight alleged sexual orientation discrimination at his job. Similarly, Plaintiff Ms. Mathis described her experience of discrimination as an African-American lesbian mother. Ms. Mathis cited instances of sexual orientation discrimination in her life and her fears not only for herself but for stigmatization or harassment of her son.

The Plaintiff Mr. Greene similarly testified via affidavit with respect to his experience of discrimination as an African-American gay man. Mr. Greene repeatedly experienced discrimination in employment prior to passage of the Human Rights Ordinance. He also showed the dual effects of racism and sexual orientation discrimination in his life.

In Mr. Guckenberger's opinion, if Article XII of the charter becomes effective, it is likely that elected city representatives and other city officials will be prevented from enacting, adopting, enforcing or administering any "ordinance, rule, regulation or policy" on behalf of gay, lesbian, and bisexual citizens, regardless of its merit. Mr. Guckenberger noted that after Issue 3, laws that benefit the gay and lesbian community will have to be adopted by Charter amendment--a burdensome task that requires a city wide campaign and support of a majority of the voters; a far more onerous task than lobbying the City Council or City administration for protection of the gay community.

Moreover, the point of doing the campaign work and gaining access to council's political corridors of power is lost if counsel cannot deliver any response on the issues that affect this identifiable group. Thus, attempting to work with the City Council or administration would be rendered meaningless.

We find that by its own terms, Issue 3 singles out persons with "homosexual, lesbian or bisexual orientation." Furthermore, it does not target specific types of problems that affect all citizens for its restrictions, but rather it targets specific citizens based upon their sexual orientation. Mr. Guckenberger could recall no other time in the history of the City of Cincinnati when such a charter provision was enacted.

Finally, Cincinnati City ordinance No. 490-1992 (Human Rights Ordinance) prohibits discrimination based on many factors, including sexual orientation, in the areas of private employment, public accommodations and housing. Discrimination based upon sexual orientation, whether it be heterosexual, lesbian, gay or bisexual, is prohibited by this ordinance.

No evidence was offered by the Defendant City of Cincinnati or the intervenor to demonstrate that it is not



substantially likely that the charter amendment will prohibit enforcement of the Human Rights Ordinance or EEO Ordinance insofar as they prohibit discrimination against gay men, lesbians and bisexuals. The charter amendment will not disturb enforcement of the provisions which prohibit discrimination against heterosexual people.

**STANDARD**

In determining whether to issue a preliminary injunction the district court must balance four interrelated criteria:

1) Whether the Plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
2) Whether the Plaintiffs have shown irreparable injury;
3) Whether the issuance of a preliminary injunction would cause substantial harm to others; [and]
4) Whether the public interest would be served by issuing a preliminary injunction.

*N.A.A.C.P. v. City of Mansfield Ohio*, 866 F.2d 162, 166 (6th Cir. 1989); *Weaver v. University of Cincinnati*, 942 F.2d 1039, 1043 (6th Cir. 1991).

**ANALYSIS**

**a) Substantial Likelihood of success**

The Plaintiffs in this case claim that Issue 3 infringes, among other things, their fundamental right to participate equally in the political process, in violation of the Equal Protection Clause of the United States Constitution. Under the Equal Protection Clause there are three standards which may be applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis review. *See City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 440 (1985). Legislation that

infringes a fundamental right must be examined under the strict scrutiny standard of review. *Id.; Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969). Consequently, we must first consider whether the right to participate equally in the political process is a fundamental right. As discussed below, we conclude that there is a strong likelihood that such right exists, and that the Defendant has violated it. Accordingly we review this equal protection challenge under the strict scrutiny standard of review.

**1**

We find support for our decision in the thorough analysis of the Colorado Supreme Court in *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 1993 LEXIS 6909 (1993). The *Evans* court noted that,

> [t]he right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our republic up to the present time.

*Evans*, 1276. Thus, it is not surprising that the United States Supreme Court has consistently rejected legislation establishing preconditions on the right to vote. *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (invalidating law requiring children or ownership of property as precondition to vote); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional); *Carrington v. Rash*, 380 U.S. 89 (1965) (holding unconstitutional law requiring civilian status to vote).

Although these cases dealt with laws directly restricting the exercise of the franchise, we find that these cases stand for the broader principal that all people have the right to be free from restrictions which would "pose the danger of denying some citizens any *effective* voice in the governmental affairs which would substantially affect their



lives." *Kramer*, 395 U.S. at 627 (emphasis added). Thus, "*[a]ny* unjustified discrimination in determining who may participate in *political affairs* or in the selection of public officials undermines the legitimacy of representative government." *Id.* at 626 (emphasis added). As a consequence, any laws which "fence out" a group of voters because of a fear of their views or because of the way they vote, threatens the group's ability to "exercise . . . rights so vital to the maintenance of democratic institutions." *Carrington*, 380 U.S. at 94. We readily conclude that these pronouncements embody principals not simply confined to cases involving the right to vote.

**2**

A second line of cases are more directly on point as they deal not with a precondition or restriction on the right to vote, but rather with the value of one's vote, in other words, the right to have one's vote count as well as be counted. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964) ("[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race"); *New York City Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989) ("each and every citizen has an inalienable right to full and effective participation in the political process"); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("the right to have one's vote counted has the same dignity as the right to put a ballot in the box").

That these case stand for the broader proposition that all citizens have not only the right "to vote" but also the deeply rooted right to meaningful and equal participation in the political process was made crystal clear in *Reynolds v. Sims*, 377 U.S. 533 (1964). In *Sims*, the Court observed that with

> the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our

> Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an *inalienable right to full and effective participation in the political process* of his State's legislative bodies. *Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.* Full and effective participation by all citizens in state government requires therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

*Sims*, 377 U.S. at 564-65 (emphasis added); *New York City Board of Estimate*, 489 U.S. at 693.

Consequently, if a representative is powerless to act on behalf of an identifiable group, the members of that group are not "self-govern[ing] through the medium of elected representatives" *see Sims*, 377 U.S. at 564-65, and thus, the right to "put the ballot in the box" *see Gray*, 372 U.S. at 380 (1963), is but a meaningless procedure. Simply put, the right to vote for someone who is powerless to represent the voter renders meaningless the right to vote for that person. It has been written, the right to full and fair representation "imports more than the mere right to cast a vote that will be weighted as heavily as the other votes cast in the election." **Lawrence H. Tribe, American Constitutional Law** §13-7, at 1074. Therefore, although gay, lesbian and bisexual citizens have the right to *cast* a vote, Issue 3's restriction on council members' and other city administrators' ability to act on their behalf eliminates the very purpose and significance of that vote.





The third type of cases crucial to our decision are cases involving candidate eligibility. Again, in these cases, actual access to the ballot box was not at issue. Rather, in *Williams v. Rhodes*, for example, the Court held that certain state election laws violated the equal protection clause because they gave "two old, established parties a decided advantage over any new parties struggling for existence and thus place *substantially unequal burdens* on both the right to vote and the right to associate." 393 U.S. 23, 31 (1968). The Court continued that the "right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Id.* Although the plaintiffs in *Williams* were never denied their right to *cast* a vote, the Court nonetheless referred to the right to "*vote effectively[]*" simply in terms of the "right to vote." *Williams*, 393 U.S. 23, 30, 31 (emphasis added). Consequently, the Court required the state to demonstrate a compelling state interest.

Thus, the Court held that,

> [i]n the present situation the state laws place burdens on... the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.
>
> * * *
>
> The State has here failed to show any "compelling interest" which justifies imposing such heavy burdens on the right to vote and to associate.

*Id.* Again, of paramount importance was the right to vote *effectively*, not the mere right "to put a ballot in the box."[1]

---

[1] In fact, the Court recognized that "the right of individuals to associate for the advancement of political beliefs, and...the right [of voters] to cast their votes effectively...of course, rank among our most precious freedoms." *Williams*, 393 U.S. at 30.

**4**

Finally, and perhaps most significantly, are the cases involving legislation which alters the normal political process of enacting laws with respect to an identifiable group. In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Supreme Court invalidated an Akron, Ohio city charter amendment, passed by a majority of the voters, that provided that the city council could implement no ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. In applying the strict scrutiny standard of review, the Court held the amendment violative of the Equal Protection Clause. *Id.* The Court stated in unambiguous terms that,

> [e]ven though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

*Id.* at 392-93 (emphasis added).

Similarly, in *Gordon v. Lance*, 403 U.S. 1 (1971), the Court considered the constitutionality of a state's constitutional and statutory mandates requiring approval of 60% of the voters before increasing bonded indebtedness, or increasing the tax rate beyond a certain amount. The Court stated that,

> we can discern no *independently identifiable group or category* that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be 'fenced out' from the franchise because of the way they will vote.
>
> * * *



> We conclude that so long as [the legislation does] not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.

*Id.* at 5, 7 (emphasis added) (citation and footnote omitted).

We acknowledge that *Hunter*, although significantly not *Gordon*, involved the issue of racial discrimination. We do not agree, however, that the holdings of these cases are limited to cases involving racial discrimination.[2] Rather, we

---

[2] First, the cases speak unmistakably in race-neutral terms. *See, e.g., Hunter v. Erickson*, 393 U.S. 385 (1969) ("state may no more disadvantage *any particular group* . . ."); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982) ("laws structuring political institutions or allocating power according to "neutral principles . . . are not subject to equal protection attack"); *Gordon v. Lance*, 403 U.S. 1, (1971) ("so long as the [legislation does] not discriminate against or authorize discrimination against *any identifiable class* . . . ."). Furthermore, *Gordon*, a case not involving race, was distinguished from *Hunter* not because the legislation in *Gordon* did not specifically involve a racial minority, but rather because the legislation involved no identifiable group at all. Thus, as the Supreme Court of Colorado pointed out, if *Hunter*

> were decided solely on the basis of the "suspect" nature of the class[] involved, there would have been no need for the Court to consistently express the paramount importance of political participation or to subject legislation which infringed on the right to participate equally in the political process to strict judicial scrutiny. To the contrary, were [*Hunter*] . . . simply a "race case[]" the Supreme Court would have been required to do nothing more than to note that the legislation at issue drew a distinction that was inherently suspect (*i.e.*, that discriminated on the basis of race), and apply strict scrutiny to resolve [that] case[] -- irrespective of the right, entitlement, or opportunity that was being restricted. . . . *Kramer v. Union School Free District No. 15*, 395 U.S. 621, 628, n.9 . . . .

conclude that these cases stand for the broader proposition that states may not disadvantage *any* identifiable group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf. *See Evans*, 854 P.2d at 1281, 1283; *Gordon*, 403 U.S. at 7; *Hunter*, 393 U.S. 385, 393; Note, *Constitutional Limits on Anti-Gay Rights Initiatives*, 106 **Harv. L. Rev.** 1905, 1916-17 (1993). Consequently, "so long as such provisions do not discriminate against or authorize discrimination against *any* identifiable class, they do not violate the Equal Protection Clause. *See Gordon*, 403 U.S. at 7 (emphasis added) (footnote omitted); *Hunter*, 393 U.S. 385, 393; *Evans*, 854 P.2d at 1281, 1283; *see also Taxpayers United v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) (upholding constitutionality of nondiscriminatory restriction on ability to use the "initiative procedure" in Michigan, but cautioning that "[o]ur result would be different if . . . [the plaintiffs] were being treated differently than other groups seeking to initiate legislation").[3]

In light of the forgoing, and based on the record, we conclude that there is a strong likelihood that under the Issue 3 Amendment, all citizens, with the express exception of gay, lesbian and bisexual citizens, have the right to appeal directly to the members of city council for legislation, while only members of the Plaintiffs' identifiable group must proceed via the exceptionally arduous and costly route of amending the city charter before they may obtain any legislation bearing on their sexual orientation. Thus, there is a

---

*Evans v. Romer*, 854 P.2d 1270, 1283 (Colo. 1993); *see Citizens for Responsible Behavior v. Sup. Court.*, 2 Cal. Rptr.2d 648, 656 (Cal. App. 1991).

[3] We note that despite the Defendants' urging, we decline to interpret the phrase "identifiable group" as used in the above cases to be synonymous with the phrase "suspect category." *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 791, 792 (1983) (labeling supporters of independent political candidate "identifiable group").



substantial likelihood that the Issue 3 Amendment "fences out" an identifiable group of citizens--gay, lesbian and bisexuals--from the political process by imposing upon them an added and significant burden on their quest for favorable legislation, regulation and policy from the City Council and city administration.[4]

Furthermore, with respect to the Plaintiffs' First Amendment claims, in this case, not only will gay, lesbian and bisexual citizens be virtually unable to obtain legislation for their group no matter how great the need, but also their advocacy may expose them to discrimination for which they will have no recourse even remotely comparable to that of other groups, to obtain protection, thereby increasing the risks of, and consequently chilling, such expression.[5]

Therefore, we find a substantial likelihood that Issue 3 will "ha[ve] the inevitable effect of reducing the total quantum of speech on a public issue" *see Meyer v. Grant*, 486 U.S. 414, 423 (1988); as such, there is a substantial likelihood that the implementation of issue 3 will chill the First Amendment rights of citizens and organizations dedicated to the advocacy of issues effecting the gay, lesbian and bisexual community. *See Id.; see also Merrick v. Board of Higher Education*, 841 P.2d 646, 651 (Or. 1992) ("Not only does the statute discourage [gays, lesbians and bisexuals] from telling others their sexual orientation, it also discourages them from becoming involved in groups advocating gay and lesbian rights, a constitutionally protected activity, because such involvement might expose them to personnel action. The statute's practical effect is to chill

---

[4] As Mr. Guckenberger testified, there is a "dramatic difference" between getting an ordinance passed and getting a charter amendment passed.

[5] In fact, one witness testified that with the passage of Issue 3, some members of organizations advocating gay, lesbians and bisexual rights have ceased donating to the organizations.

speech and other expression and to severely limit open communication . . . .").

7

Finally, we find especially significant the fact that under the Cincinnati Human Rights Ordinance heterosexuals are still a protected class of people, while Issue 3 would remove only gay, lesbian and bisexual citizens from those citizens protected from the ordinance's prohibition of discrimination based on sexual orientation. This only reinforces our conclusion that the Defendants have proffered no compelling justification to single out gay, lesbian and bisexual citizens for the additional and substantial burdens imposed on their ability to obtain legislation not required of any other identifiable group of citizens. The Court is unaware of what compelling state interest is furthered by removing City Council's and the City administration's ability to address the concerns of one single group of people no matter what need may arise in the future and under what circumstances, while all others may benefit from the direct action of the City Council and City administrators.[6]

Consequently, the Court finds that there is a substantial likelihood that Issue 3 infringes the Plaintiffs' First Amendment rights, and their fundamental right to participate equally in the political process. Similarly, we find that there

---

[6] We also note that even under a rational basis standard of review, based on the record, there is a significant likelihood that amendment 3 would not pass muster. *See Steffan v. Aspin*, No. 91-5409, 1993 U.S. App.LEXIS 29521, at *39-*42 (D.C. Cir. Nov. 16, 1993) (military's ban on homosexuals lacked rational basis); *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992) (same); *Citizens for Responsible Behavior v. Sup. Court.*, 2 Cal. Rptr.2d 648, 656 (Cal. App. 1991) (anti-gay initiative requiring a majority vote to enact any prohibition on sexual orientation discrimination lacked rational basis).



is a strong likelihood that there is not a compelling state interest in the enactment of Issue 3.

**b) Irreparable Harm and Harm to Others**

We also conclude that the Plaintiffs will suffer irreparable harm if the Court does not issue the injunction because of the threatened infringement of the Plaintiffs' fundamental rights. *See Evans v. Romer*, 854 P.2d 1270, 1286 (Colo.), *cert. denied*, 1993 LEXIS 6909 (1993); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)); *Weaver v. University of Cincinnati*, 942 F.2d 1039, 1043 (6th Cir. 1991). Similarly, we conclude that maintaining the status quo under the existing city Human Rights Ordinance and EEO Ordinance is the far more prudent course of action in light of the nature of the threat faced by the Plaintiffs in, among other things, their employment and housing situations. Thus, while no harm will occur to others if the preliminary injunction is issued, the increased threat of harassment which we view as likely to occur if Issue 3 is given effect, would seriously undermine the public interest.

**CONCLUSION**

Accordingly, the Court hereby GRANTS the Plaintiffs' Motion for Preliminary Injunction, prohibiting the implementation of issue 3, until further order of this Court, and ORDERS the Plaintiffs to post bond in the amount of one hundred dollars.

SO ORDERED.

Dated Nov. 19, 1993

S. Arthur Spiegel
United States District Judge

No. 95-239

In The

# Supreme Court of the United States

October Term, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

*Petitioners,*

v.

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION

FAY D. DUPUIS
City Solicitor

KARL P. KADON, III
*Counsel of Record*
Deputy City Solicitor

MARK S. YURICK
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3334

*Attorneys for Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Does the United States Constitution guarantee that all citizens have a fundamental constitutional right to "participate equally in the political process"?

2. If there is indeed a fundamental constitutional right to "participate equally in the political process," does a municipal charter amendment violate that right when it merely prohibits the municipal government from creating "minority or protected status, quota preference or other preferential treatment" for "homosexuals, lesbians or bisexuals"?

3. Do gays, lesbians and bisexuals constitute a quasi-suspect class?

4. Is a municipal charter amendment which merely prohibits the municipal government from creating "minority or protected status, quota preference or other preferential treatment" for "homosexuals, lesbians or bisexuals" rationally related to legitimate government interest?

## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued



## STATEMENT OF THE CASE

In 1991 and 1992 the City of Cincinnati passed two Ordinances that were aimed at providing certain groups of people with specific redress for alleged acts of discrimination. The foremost examples of these Ordinances were Ordinance number 79-1991 (hereinafter "EEO") and Ordinance number 490-1992 (hereinafter "HRO"). The EEO made it illegal to discriminate on the basis of "sexual orientation" in hiring City employees and in making appointments to City Boards and Commissions. The HRO made it illegal to discriminate on the basis of sexual orientation in the areas of private employment, public accommodation, and housing. [1]

In response to these measures, a group of private individuals formed an organization called "Take Back Cincinnati" which later changed its name to "Equal Rights Not Special Rights." One of the main priorities of this group was to collect sufficient signatures to place a Charter Amendment, which later became commonly known as Issue 3, on the ballot of the next general election.[2] The group was successful in obtaining the requisite

---

[1] City Council has since repealed the portion of the HRO forbidding discrimination on the basis of sexual orientation. Therefore, as petitioners correctly concede, the impact of Issue 3 on that measure is moot.

[2] The City of Cincinnati is a Charter Municipality organized and operating pursuant to the Home Rule provisions of Ohio's State Constitution. In a Charter municipality, the Charter acts as a sort of local constitution. Charter provisions supersede local ordinances, and the Charter may not be amended by the local legislature, which is known as City Council. Rather, in order to amend the Charter, a majority of the voters in Cincin-

number of signatures, and Issue 3 was placed on the November 2, 1993 ballot. Issue 3 provides as follows:

> "The City of Cincinnati and its various Boards and commissions may not enact, adopt, enforce or administer any ordinance, regulation, or policy which provides that a homosexual, lesbian or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force and effect."

In reaction to the formation of Equal Rights Not Special Rights, petitioner "Equality Cincinnati" was formed. One of the primary goals of Equality Cincinnati was to defeat the passage of Issue 3. Both Equality Cincinnati and Equal Rights Not Special Rights campaigned in favor of their respective positions on Issue 3. After a hard fought battle, Issue 3 was passed into law. The vote tally was approximately 62% for passage and 38% against.

---

nati must vote in favor of a proposed revision or amendment at a general or special election. A measure may be placed on the ballot by City Council itself at its own initiative, but Council must place any measure on the ballot that has received the endorsement of a prescribed percentage of electors. Ohio Constitution, Article XVIII, Sections 3, 7, 8 and 9.



Prior to Issue 3 taking effect, however, petitioners filed the present claim against the City of Cincinnati to enjoin the enforcement of Issue 3. Petitioners claim that Issue 3 violates their rights to equal protection, free speech, free association, and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution. Petitioners also claim that Issue 3 is unconstitutionally vague.

On November 15, 1993, Mark Miller Thomas Brinkman, Jr., Albert Moore, and Equal Rights not Special Rights moved to intervene as defendants. On November 16, 1993, the trial Court granted petitioners' motion for a preliminary injunction. On December 27, 1993, the District Court granted the motion to intervene. On June 3, 1994, the trial Court denied motions for summary judgment filed on behalf of the City and the intervening defendants.

A trial to the Court was held and the trial Judge heard testimony from a variety of expert and lay witnesses. After the trial, the District Judge issued extensive findings of fact. The Court concluded that the proposed Charter Amendment infringed petitioners' "fundamental right to equal access to the political process" as well as their rights of free speech and association and right to petition their government for redress of grievances, which violations subjected Issue 3 to strict scrutiny. Additionally, the Court held that homosexuals as a group comprise a "quasi-suspect class." Further, the Court found that Issue 3 was insufficiently related to any legitimate governmental interest to pass muster under a rational basis analysis. Finally, the Court held that Issue 3 was also void for vagueness.

The United States Court of Appeals for the Sixth Circuit reversed the District Court's ruling in its entirety. First, the Court of Appeals noted that since the trial Court's ostensible "findings of fact" were, in reality, findings of ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support "constitutional facts", these findings were subject to plenary appellate review.

Next, the Court noted that homosexual orientation cannot be the basis for suspect classification in the context of equal protection analysis. Since homosexuals are not identifiable "on sight", those homosexuals that are affected by legislation concerning sexual orientation choose to be so affected by their conduct. Since *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that homosexuals possess no fundamental right to engage in homosexual conduct, such conduct could not form the basis for suspect classification.

The Court further held that there exists no fundamental right to equal participation in the political process. The cases upon which the District Court relied for this fundamental right were, without exception, race based classification cases. Since the realization of a homosexual legislative agenda is not constitutionally guaranteed, the narrow restriction upon the political avenues available to the unidentifiable and non-protected class of homosexuals and their allies does not rise to constitutional dimensions. The Court recognized that the opponents of Issue 3 "simply lost one battle of an ongoing political dispute."



Also, the Court of Appeals noted that Issue 3 did not impermissibly burden petitioners' rights of free speech or association, nor violate petitioners' right to petition their government for a redress of grievances. Since no fundamental right was involved the Court found that the proper standard of judicial scrutiny was the "rational basis" standard. Under this highly deferential standard, social or economic legislation must be affirmed if there is any reasonably conceivable state of facts that could provide a rational basis for a classification. In other words, the party challenging the rationality of the legislation bears the burden of negating every conceivable basis for the action, regardless of whether or not such supporting rationale was cited by, or actually relied upon by the promulgating authority. The Court noted that the measure furthered numerous legitimate public purposes, and therefore, passed constitutional muster when subjected to appropriate scrutiny.

Finally, the Court of Appeals held that Issue 3 was not unconstitutionally vague. This was especially true since City Council amended the HRO to delete any reference to sexual orientation. Petitioners have not challenged the Sixth Circuit's ruling in this regard.

## SUMMARY OF ARGUMENT

In the history of this democracy, there has always been a "losing" point-of-view, so to speak. The strongest underpinning of the republic has always been our willingness of the "losing" point-of-view to accept legislative defeats gracefully (non-violently), regroup, and attempt

with new and better arguments to convince the "winning" side to alter its stance. The Petitioners' suit, if successful, would radically change for the worse our cherished democratic traditions. Respondent respectfully submits that the decision of the Sixth Circuit gives due consideration to the First Amendment rights of all those citizens who voted to remove the ability of their elected and appointed municipal representatives to give additional, special, preferential treatment to a special interest group. Unlike the trial court's repudiation of this *vox populi*, the most fundamental of all rights, the Sixth Circuit's ruling prejudices no one's rights.

Respondents herein submit four reasons that this Court should deny the petition. These reasons, discussed in detail later, *infra,* are stated rather simply below.

There is no such thing as a "fundamental constitutional right to participate fully or equally in the political process." Petitioners seek to enlarge, for themselves only, the substantive due process rights that all citizens enjoy equally. The Sixth Circuit's decision is in accord with decisions by this Court which caution strongly against "tailoring novel fundamental rights." *See, e.g., Bowers v. Hardwick,* 478 U.S. 186, 195, 106 S.Ct. 2841, 2846 (1986).

Even should there be created such a novel fundamental constitutional right, it could not be offended by means of a determination by the citizens through the [state] constitutionally-guaranteed initiative and referendum process that the municipal government not create preferences or quotas to benefit only gays, lesbians and bisexuals.



Gays, lesbians and bisexuals "do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group" and so, cannot constitute a "quasi-suspect classification." *Bowen v. Gilliard,* 483 U.S. 587, 602, 107 S.Ct. 3008, 3018 (1987).

A charter amendment which merely prohibits the municipal government from enacting preferences or quotas strictly for the benefit of gays, lesbians and bisexuals bears a rational relationship to legitimate government interests, which the Sixth Circuit found in abundance (a "litany," to be precise). Notwithstanding any of the above reasons, respondent also submits that this case does not represent, as petitioners suggest, an infringement upon the ability of any Cincinnati electors to petition their government for redress of grievances. Constitutional rights to initiative and referendum are held by Ohio citizens under the state's constitution. These rights may not be abridged. Issue 3 does nothing to limit these rights, and the decision by the Sixth Circuit actually reinforces the sanctity of that process. Section 1f, Article II of the Ohio Constitution provides as follows:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

The rejection of a sufficient petition by a legislative authority constitutes an abuse of discretion. *State, ex rel. Citizens v. Widman,* 66 Ohio App.3d 286 (1990); *Heidtman v. Shaker Heights* (1954), 99 Ohio App. 415, 119 N.E.2d 644,

affirmed (1955), 163 Ohio St. 109, 126 N.E.2d 138. Sections 8 and 9, Article XVIII of the Ohio Constitution provide that upon the submission of the proper initiative petition, City Council must place the question on the ballot at the next general municipal election or at a special election called by Council. *State, ex rel. Blackwell v. Bachrach,* 166 Ohio St. 301 (1957). Council's review is limited to such matters as timeliness, regularity of signatures and form. Council is without authority to reject an initiative petition based upon claims of illegality or unconstitutionality of substantive provisions. *State, ex rel. Kittel v. Bigelow,* 138 Ohio St. 407 (1941). The charter amendment by initiative process must be liberally construed in favor of the exercise of this right by the electorate. *State, ex rel. Sharpe v. Hitt,* 115 Ohio St. 529 (1951); *State ex rel. King v. Portsmouth,* 27 Ohio St.3d 1 (1986). In fact, if an initiative proposal is delayed at the Council level due to the failure of the Council to pass in timely fashion an ordinance directing that the measure be placed on the ballot, a mandamus action will lie against Council for abuse of discretion. *State, ex rel. Jurcisin v. Cotner,* 10 Ohio St.3d 171 (1984).

The Sixth Circuit's decision supports the right of the people, guaranteed by the constitutions of both the state of Ohio and the United States of America, to exercise the initiative process. The Sixth Circuit's decision ensures that irrespective of the consideration of their sexual orientation, all Ohio and Cincinnati citizens enjoy the right to petition their government for redress of grievances. The Sixth Circuit's decision supports *equality.*



## REASONS FOR DENYING THE WRIT

### 1. THE UNITED STATES CONSTITUTION DOES NOT GUARANTEE THAT ALL CITIZENS HAVE A "FUNDAMENTAL CONSTITUTIONAL RIGHT" TO "PARTICIPATE EQUALLY IN THE POLITICAL PROCESS."

The City respectfully submits that this Court has never recognized as "fundamental" any "right to participate equally in the political process."

Under traditional equal protection analysis, legislation that involves a suspect classification or affects a fundamental right is subject to the strict scrutiny analysis. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). If the government cannot show a compelling state interest, legislation that involves a suspect classification or affects a fundamental right will be declared unconstitutional. *Id.* at 440. The Sixth Circuit correctly found that in this case gays, lesbians and bisexuals do not constitute a suspect classification, and that Issue 3 infringes no fundamental constitutional right.

This Court has defined "fundamental" rights to be those without which neither liberty nor justice would exist. They are freedoms essential to the concept of ordered liberty. They are inherent in human nature, and are consequently inalienable. *Palko v. Connecticut,* 302 U.S. 319 (1937) (holding that the Fifth Amendment protection against double jeopardy did not apply to the states, later overruled by *Benton v. Maryland,* 395 U.S. 784 (1969), which held that the Fifth Amendment does apply to the states). Justice Benjamin Cardozo, writing for the majority in *Palko,* found that some select protections from the

Bill of Rights were absorbed into the due process guarantee of the Fourteenth Amendment only because they were fundamental to our notions of liberty and justice. Cardozo stated that such rights imposed limits upon the states because "they represented the very essence of a scheme of ordered liberty, . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Palko v. Connecticut*, 302 U.S. at 325. The position that "equal participation in the political process" is such a *fundamental* right and further, that it is a *fundamental* right to which gays, lesbians and bisexuals as an "identifiable group" are entitled is untenable. Such an expansive guarantee is to be found neither in the Bill of Rights nor in prevailing constitutional law. The decision of whether a right is fundamental involves a judicial determination that the text or structure of the federal Constitution evidences a value that should be taken from the control of the legislative branches of government and is best characterized as a substantive due process right. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 419 (1993) (hereinafter "*Evans I*"). See also, 3 Treatise on Constitutional Law section 18.3, at 18 n.19; *Bowers v. Hardwick*, 487 U.S. 186 (1986) (Powell, J., concurring); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (suggesting that fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution). The rights are applicable to the states through the Fourteenth Amendment are also considered fundamental rights for purposes of equal protection analysis. See 3 Treatise on Constitutional Law section 18.39, at 490. The Sixth



Circuit's decision prevented the improper enlargement of substantive due process to which gays, lesbians and bisexuals as citizens are entitled. Absent the Sixth Circuit's decision, that assemblage would have accomplished exactly what the Issue 3 proponents said they would – "special" treatment.

The number of rights that this Court has found to be fundamental is limited. For example, housing, the right to refuse medical treatment, welfare payments and government employment are not among our fundamental constitutional rights. See *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (right to refuse medical treatment); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (employment); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education); *Dandridge v. Williams*, 397 U.S. 471 (1970) (welfare). See also 3 Treatise on Constitutional Law section 18.42, at 821-31. Given the precious nature of fundamental rights, "There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." *Bowers*, 478 U.S. at 194-95. And, "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 397 U.S. at 33.

The decision of the District Court below was founded upon circular logic. The District Court relied upon the analysis of the Colorado Supreme Court in the *Evans I* case in support of their argument that gays, lesbians and bisexuals have a fundamental constitutional right to "full" or "equal" participation in the "political process." As the dissenting justice in both *Evans I* and *Evans II* (the

latter is *Evans v. Romer*, 882 P.2d 1335 (Colo.1994), *cert. granted*, 115 S.Ct. 1092 (1995), hereinafter "*Evans II*", or if referred to collectively with *Evans I*, then "*Evans I and II*") carefully pointed out, the majority opinions (in *Evans I and II*) concocted this new "fundamental right" by erroneously applying prior case law in which the unconstitutional governmental actions involved were the use of impermissible racial classifications. For example, the *Evans I* majority relied on the case *Reitman v. Mulkey*, 387 U.S. 369 (1984), yet the equal protection analysis in that case is focused solely on a racial classification drawn by a state constitutional amendment and as such, represents a traditional suspect classification analysis. The dissent in *Evans I* reported that "no court or commentator has ever viewed Reitman, either alone or in combination with other cases, as having applied fundamental right analysis." *Evans I*, 854 P.2d 1270, 1293 (1993 Colo.).

Another case relied on by the *Evans I* majority was *Palmore v. Sidoti*, 466 U.S. 429 (1984), where this Court invalidated a child custody order that had been based solely on a judicial determination that it would be harmful to a child to remain in a racially mixed household. *Palmore*, 466 U.S. at 431. Again, the dissent in *Evans I* reported that, "Like Reitman, no court or commentator has ever viewed Palmore, either alone or in combination with other cases, as having applied fundamental right analysis." *Evans I*, 854 P.2d 1270, 1293 (1993 Colo.). Similarly, an examination of the decisions in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) reveals that what was involved in those cases was the application of rational basis review.



No case relied upon by either of the majorities in *Evans I and II* involved the recognition of a "fundamental right to equal or full participation in the political process." Such a concept is a fiction created by the Colorado state court system and by the District Court in the case *sub judice*. Rather, this Court has repeatedly held that there is a fundamental right to have one's vote counted equally, which is characterized as the [fundamental] "right to vote." *Reynolds v. Sims*, 377 U.S. 533 (1964); see also 2 Treatise on Constitutional Law section 15.7, at 435; e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). This fundamental right clearly includes the right to participate in the electorial process by exercising the franchise, *Dunn v. Blumstein*, 405 U.S. 330 (1972) ("this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis"); 2 Treatise on Constitutional Law section 15.7, at 435; cf. Frank L. Michelman, Conceptions of Democracy in American Constitutional Argument, 41 Fla. L.Rev. 443, 459 n.63 (1989) (characterizing the "right to participate in elections on an equal basis" as a fundamental right) but no more.

The right to vote is not equivalent to the right to "participate" in any way, full or otherwise, in the electoral process. See generally, Lawrence H. Tribe, American Constitutional Law section 13-1, at 1062 (2d ed. 1988) (characterizing political participation rights as "rights poised between procedural due process and the freedoms of expression and isolation"). In fact, the right to vote is itself – in most states – legitimately qualified by various obstacles. Simply put, there is no fundamental right to "full participation in the political process."

Petitioners direct this Court to the case *Hunter v. Erickson*, 393 U.S. 385 (1969), as proof of their claim that there exists a fundamental right to participate equally in the political process, and argue further that Issue 3 fails the "Hunter neutral principles test" because it "harms the fundamental rights of a 'specifically identified group.' " The "group" in *Hunter* was a traditional suspect classification. In *Hunter*, this Court invalidated an Akron, Ohio city charter amendment which repealed a racial anti-discrimination ordinance and required voter approval before any such future ordinances could be enacted. *Hunter*, 393 U.S. at 387. The amendment in that case was characterized by this Court as placing "special burdens on racial minorities within the governmental process," *id.* at 391. This Court viewed the issues in *Hunter* as racial issues, not as "political participation" issues. The Sixth Circuit and the dissent in both *Evans I and II* identified this distinction and concluded logically that this court has never recognized such a broad-based fundamental right. Appendix to Petition (hereinafter "*App.*") at 15a - 17a. *Evans I*, 854 P.2d 1270 (1993 Colo.); *Evans II*, 882 P.2d 1335 (Colo. 1993).

Decisions from this Court and from the Sixth Circuit subsequent to *Hunter* bolster this interpretation. *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971); *Washington v. Seattle School Dist. No. 1*, 4588 U.S. 457 (1982). See also *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986); *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086 (6th Cir. 1985); *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974); *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973); *Bradley v.*



*Milliken*, 433 F.2d 897 (6th Cir. 1970); *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969).

The *James* case concerned the validity of a California state constitutional measure prohibiting public bodies from developing, constructing, or acquiring low-income housing projects until voters approved the project in a referendum. The federal district court relied on *Hunter* to find that the constitutional measure violated the Equal Protection Clause. This Court did not apply the strict scrutiny standard of review, and found that the measure did not offend equal protection, writing that:

> "Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by 'placing special burdens on racial minorities within the governmental process.' . . . Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . *The present case could be affirmed only by extending Hunter, and this we decline to do.*"

*Id.* at 140-41 (emphasis added).

Before this Court, the appellees in *James* asserted that the mandatory referendum required by the constitutional amendment "hampered persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142. The plaintiffs in *James* were an actual, identifiable group who claimed that a constitutional amendment had the effect of "fencing them out" from the normal political process. Respondent submits that the Sixth Circuit applied to their decision the same logic used by this Court in the *James*

case, and properly rejected the notion that Issue 3 offends equal protection. As this Court held in *James*:

> "Of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people."

*Id.* See also, the dissenting opinion in *Evans II*, 882 P.2d 1335 (Colo. 1993).

Petitioners cite the Sixth Circuit's decision in *Taxpayers United For Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993), in support of their contentions that: (1) a mere identifiable group is a suspect class; and (2) "disparate impact" is a sufficient basis to invalidate the will of the electorate. The Sixth Circuit correctly found that the *Taxpayers United* decision does not, in truth, advance such claims. In that case, the plaintiffs alleged that their First and Fourteenth Amendment rights were violated when the Michigan Board of State Canvassers refused to certify their proposed initiative for submission. Specifically, plaintiffs contended that they had been denied their right to vote and their rights to assemble and to engage in political speech. They also raised due process and equal protection challenges, and argued that the state had to



present a compelling state interest in order to preserve its procedure for reviewing the validity of initiative petitions. *Id.* at 293-94. The District Court rejected these contentions, held that the plaintiffs had failed to state a claim upon which relief could be granted, and dismissed the case. The Sixth Circuit, in upholding the action of the district court, pointed out that although this Court has on a number of occasions held that the *right to vote* is a fundamental right, *id.* at 296, citing, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); "the plaintiffs do not cite to us nor does our research identify any decision of the Supreme Court or a lower federal court *holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote.*" *Taxpayers United*, 994 F.2d at 296 (emphasis added). The Sixth Circuit also cited a Georgia district court decision which stands for the position that although a state may not discriminate on the basis of suspect classifications such as race, the actions of state officials [in excluding certain signatures on initiative petitions] was permissible so long as those actions were not based on suspect classifications. *Id.*, citing *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F.Supp. 1036 (M.D. Ga. 1985). Finally, in the *Taxpayers United* case, the Sixth Circuit rejected the plaintiffs' claims that they were being denied rights to freedom of speech and political association, holding that the Michigan system was constitutional also because it "does not restrict the means that the plaintiffs can use to advocate their proposal." *Taxpayers United*, 994 F.2d at 297. As the case before the District Court demonstrated completely, petitioners have not been denied the right to vote. Petitioners have not been

denied the right to organize and to engage in political speech. Petitioners have not been denied the right to change the Charter of the City of Cincinnati by the same methods used by the electorate of this City for decades. *The change to the charter is a reflection of the strong interest of the government in ensuring that proposals are not submitted for enactment into law unless they have sufficient support. Anderson v. Celebreeze,* 460 U.S. 780 (1983). So long as the people do not impinge upon the rights of a suspect or quasi-suspect class, and do not affect the fundamental right *to vote,* their actions should be accorded deference. Petitioners in this case are treated no differently than any other group when it comes to changing the charter. The people have only determined that "No *special* class status may be granted based upon sexual orientation, conduct or relationships" and that, "The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of *minority or protected status, quota preference* or other *preferential* treatment" as a matter of Charter. The Sixth Circuit properly found that in no way can this be construed as a ban on speech, or a denial of the right to vote to a non-suspect class, or the infringement of any other constitutionally-guaranteed right (fundamental or otherwise). As the Sixth Circuit relates in its decision in this case, the *Taxpayers United* decision stands for the ruling that, "unlike voting, the 'right' to sign an initiative petition, and the 'right' to obtain certification of



a proposed initiative, are not fundamental, thereby deciding by necessary implication that non-voting forms of political activity are not categorically fundamental." *App.* at 17a.

This Court has consistently refused to apply the protections necessary for racial and religious minorities to achieve equality to others who claim merely to be "identifiable groups." Such a standard does not exist. Although petitioners successfully convinced the District Court to include themselves in that body of citizens whose ranks include Dr. Martin Luther King, the Reverend Jesse Jackson, and countless others, the Sixth Circuit was not deceived. Try as they might, petitioners simply are not members of that group, and should not be permitted to point to the civil rights movement to buttress their own causes. The Sixth Circuit's ruling is a sound one. Inasmuch as there is no fundamental right at issue here, this Court should decline to hear this case.

**2. EVEN IF THERE IS INDEED A "FUNDAMENTAL CONSTITUTIONAL RIGHT TO PARTICIPATE EQUALLY IN THE POLITICAL PROCESS", A MUNICIPAL CHARTER AMENDMENT DOES NOT VIOLATE THAT RIGHT WHEN IT MERELY PROHIBITS THE MUNICIPAL GOVERNMENT FROM CREATING "MINORITY OR PROTECTED STATUS, QUOTA PREFERENCE OR OTHER PREFERENTIAL TREATMENT" FOR "HOMOSEXUALS, LESBIANS OR BISEXUALS."**

An examination of the plain and ordinary meaning of Issue 3 reveals that the most basic premise of petitioners'

case stands in stark contrast to reality. That "basic premise" is that Issue 3 prevents the City from enacting any anti-discrimination laws that will benefit that portion of the municipal citizenry that is "homosexual, lesbian or bisexual." This premise was correctly recognized by the Sixth Circuit as seriously flawed.

Although subsequently modified so that references to "sexual orientation discrimination" were deleted, the HRO in existence at the time the Issue 3 Charter amendment was adopted prohibited discrimination based upon "sexual orientation" in the areas of private employment, public accommodations and housing. *App.* at 23a. Although the District Court correctly found that all sexual orientation discrimination was banned by the HRO, it went on to conclude incorrectly that Issue 3 not only acts definitively to repeal the HRO but also puts in place a Charter mechanism which "prevents" the City from prohibiting sexual orientation discrimination against homosexuals, lesbians and bisexuals. *App.* at 53a-54a, 77a-84a.

Prohibitions against discrimination on the bases of race, gender, etc. have never been found to accord any members of a subset of those groups (the "protected classes") "special" or "privileged" treatment. The conduct which is proscribed is the discrimination on the basis of the characteristic identified in the statute. The statute is not to be construed as "specially" or "preferentially" preventing discrimination against any identifiable subset within the statutory classification. For example, statutes prohibiting discrimination on the basis of race do not provide a specifically identifiable protection for African-Americans.



The only line of cases in which certain classes have been found to have received "special" rights are the affirmative action cases such as *City of Richmond v. Croson*, 488 U.S. 469 (1989) and *Bd. of Regents v. Bakke*, 438 U.S. 265 (1978). In that line of cases, this Court consistently held that the creation of special rights, such as quotas and set-aside programs, violates the Equal Protection Clause unless supported by specific legislative findings indicating past patterns of discrimination and detailed findings that the remedy fashioned by the legislative body was narrowly tailored to combat such discrimination. See, *Croson*, 488 U.S., at 498-99. This standard, as applied to racial classifications in *Croson* and *Bakke*, has been applied as well to gender-based classifications. See *F. Buddie Contracting Co. v. City of Elyria*, 773 F.Supp. 1018 (N.D. Ohio 1991). Thus, the Equal Protection Clause itself has been found to prohibit the granting of "special" or "privileged" treatment except in very narrowly defined circumstances.

As such, any provision, such as Issue 3, that purports to preclude special protection for any specified subset of a protected class would accomplish no more than the Equal Protection Clause has been held to require in the above-cited line of cases. As no special treatment for an identifiable subset of a given classification can be conferred by a general anti-discrimination provision, a voter initiative that forecloses such special treatment is at most duplicative of the dictates of the Equal Protection Clause and therefore in effect a nullity. Simply put, the voter initiative cannot "repeal" a protection that cannot have

been properly accorded by the prior enactment. Therefore, it is quite likely that Issue 3 did not act to repeal the HRO and the EEO ordinances. Respondent's position is that whether or not Issue 3 repealed those ordinances, it is a valid exercise in self-government.

### 3. GAYS, LESBIANS AND BISEXUALS DO NOT CONSTITUTE A QUASI-SUSPECT CLASS.

The Sixth Circuit cited this Court's decision in the case *Bowers v. Hardwick*, 478 U.S. 186 (1986), in support of the position that gays, lesbians and bisexuals do not constitute a "suspect class" or "quasi-suspect class." *App.* 10a-15a. This position is not unique. Courts have consistently rejected claims that an identifiable group of homosexuals constitutes a suspect class. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (concluding that homosexuals are neither a suspect nor a quasi-suspect class); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (same), cert. denied sub nom. *Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (same), cert. denied, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (same); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984) (same), aff'd., 470 U.S. 903 (1985); *Steffan v. Cheney*, 780 F.Supp. 1 (D.C. 1991) (same), *rev'd*, 8 F.3d 57 (D.C. Cir. 1993), *reversal vacated pending rehrg. en banc*, 8 F.3d, at 70 (1/7/94). In fact, the dissenting judge in *Evans I*, 854 P.2d 1270, 1288 (1993 Colo.) stated that, "A number of states continue to classify the conduct that defines the class as criminal behavior." *Id.* That judge went on to cite laws from such states,



including two states in the Sixth Circuit: Kentucky and Michigan.

In the case *Steffan v. Cheney*, 780 F.Supp. 1 (D.C. 1991), Midshipman Steffan sought to distinguish the previous court decisions which held that gay men and lesbians do not constitute either a "suspect" or "quasi-suspect" classification. Steffan argued that while previous cases had clearly involved some sort of homosexual conduct, in his case the government action was predicated upon his status as a homosexual. *Steffan v. Cheney, Id.*, at 4. The Court rejected this argument, and concluded that he was not a member of either a "suspect" or a "quasi-suspect" class. *Id.* at 10. Applying a rational basis analysis to the government policy in question, the Court upheld the constitutionality of the proscription. *Id.* at 16.

In reaching this conclusion, the *Steffan* Court considered many of the same arguments heard by the District Court in this case. Applying the analysis undertaken on past occasions by this Court, the District Court in *Steffan* found that: (1) while homosexuals have suffered a history of discrimination, there was no "gross unfairness" which in context was "so inconsistent with equal protection as to be termed 'invidious' " (*id.* at 5, quoting *Ben-Shalom v. Marsh*, 881 F.2d 454 (footnote omitted) (7th Cir. 1989) (same), cert. denied sub nom. *Ben-Shalom v. Stone*, 494 U.S. 1004 (1990)); (2) homosexuals do not possess any obvious, immutable or distinguishing characteristics that define those with a homosexual orientation as a discrete or separate group (*Steffan v. Cheney, id.* at 5-6); (3) "homosexual orientation is neither conclusively mutable nor immutable since the scientific community is still quite at sea on the causes of homosexuality, its permanence, its

prevalence, and its definitions" (*Id.* at 6) and; (4) homosexuals "clearly" enjoy "a good deal of political power in our society, not only with respect to themselves, but also with respect to issues of the day that affect them" (*Id.* at 7-8). For brevity's sake, let it be said only that the court in *Steffan* also went into great detail when applying facts and data to support its conclusions, unlike the District Court in this case. Unquestionably then, the District Court in the case at bar erred when it found that the plaintiffs constitute a "quasi-suspect" class. The Sixth Circuit properly corrected that error, and since there is no "quasi-suspect" classification issue here, the rational basis test that should have been applied to Issue 3 by the District Court, but was instead applied by the Sixth Circuit, reveals that rational bases do indeed exist for such a measure. These bases are detailed below.

**4. A MUNICIPAL CHARTER AMENDMENT WHICH MERELY PROHIBITS THE MUNICIPAL GOVERNMENT FROM CREATING "MINORITY OR PROTECTED STATUS, QUOTA PREFERENCE OR OTHER PREFERENTIAL TREATMENT" FOR "HOMOSEXUALS, LESBIANS OR BISEXUALS" IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.**

The government has, at a minimum, a legitimate interest in ensuring that proposals are not submitted for enactment into law unless they have sufficient support. *Anderson v. Celebreeze*, 460 U.S. 780 (1983); *Taxpayers United For Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993). This is part of the state's interest in ensuring that its elections are run fairly. *Anderson*, 460 U.S. at 788.



Issue 3 is, at a minimum, rationally related to the legitimate interest of government in ensuring that there is sufficient support for proposals that would create quotas or other preferential treatment, minority or protected status for this special interest group.

Issue 3 does not prevent lesbian, gay and bisexual Cincinnatians, but no others, from obtaining legal protection, as petitioners claim. Rather, Issue 3 merely requires people in favor of a particular political view to establish that a majority of the community also supports that view. In this case, it is abundantly clear that Cincinnatians do not wish to empower their municipal legislators or any other appointed municipal governmental representatives to enact laws or policies which would create quotas or other preferential treatment, minority or protected status for this special interest group.

Petitioners fall far short of the mark in their attempts to distinguish *Gordon v. Lance*, 403 U.S. 1 (1971) by claiming that no identifiable group was impacted by the West Virginia Constitutional provision which required a 60 percent affirmative vote in a referendum election in order for the state to incur bonded indebtedness or to increase tax rates. Their reasoning in this regard is not compelling. Certainly the residents of Roane County who favored the contested bond issue and tax levy were "identifiable" in some sense of the word based upon their position on the levy and bond issues. In other words, their stance on that issue distinguished them from voters with the opposite view. They could be identified by reference to the way that they had voted in the election.

In this way they were similar to the opponents of Issue 3. Petitioners did not contend, and the trial court did not find, that 38 percent of the voting population of Cincinnati was gay, lesbian or bisexual. Rather, the only identifiable characteristic of the opponents of Issue 3 is their stance on Issue 3, evidenced by their voting preference. This was also true in *Gordon*. The crucial determination of this Court in *Gordon* was not whether the plaintiff group could be identified but rather, whether the challengers of the provisions were a "discrete and insular minority" singled out for special treatment; or whether they were denied access to the ballot because of some extraneous condition such as race. *Gordon*, 403 U.S. at 5. Having determined the answers to these questions were in the negative, this Court upheld the Constitutional provision.

Also, proponents of Issue 3 would say that public morality is implicated in Issue 3. It is not unlikely that Issue 3 was viewed by its proponents as a means of voicing disapproval of certain conduct and lifestyle choices of homosexuals, bisexuals and lesbians. After all, as described above, Issue 3 does add a degree of difficulty for those who believe that these groups should be specially protected to get legislation enacted to effectuate their goals. However, as this Court noted in *Bowers v. Hardwick*, 478 U.S. 186 (1986):

> "[R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing



> essentially moral choices are to be invalidated . . . the courts will be very busy indeed."

*Id.*

If, and when a majority of Cincinnatians believe that a group of their fellow citizens is being so unfairly treated that action is necessary, respondent respectfully submits that an amendment to the City's Charter designed to remedy that unfair treatment would pass by as wide a margin as Issue 3 did in November of 1993. That is the way that the American system is supposed to work. It is absurd and offensive to assert, as petitioners have done, that a majority of Cincinnatians are "homophobic" and actually want to discriminate against them. The truth is, most Cincinnatians simply disbelieve the notion, espoused by petitioners, that gays, lesbians and bisexuals suffer invidiously, daily, and incessantly due to their status or conduct. As the previous court decisions indicate, there is so much that is unknown about what precipitates homosexual status or conduct that the City urges this Court to hold that it is simply not jurisprudentially sound to adopt the opinions on the subject offered by the plethora of available "experts." Under prevailing law, gays, lesbians and bisexuals are not, and should not be considered to be, a "quasi-suspect" classification. Further, by any common-sense consideration, the interests articulated by the respondent satisfy any degree of scrutiny applied to Issue 3, to the extent that the Court's consideration necessarily extends beyond a traditional rational basis analysis.

## CONCLUSION

For all of the above reasons, the petition for a writ of *certiorari* should be denied in this matter. The decision of the United States Court of Appeals for the Sixth Circuit should stand. There is neither a "quasi-suspect class" issue nor does the charter amendment intentionally prevent from exercising a "fundamental" right. *Washington v. Davis*, 426 U.S. 229 (1976). Clearly, under prevailing law neither homosexuality nor bisexuality entitle these petitioners to claim that they belong to a quasi-suspect class. Likewise, in its decision the Sixth Circuit reaffirmed that most basic of all rights guaranteed by the federal constitution, namely: that Americans have the inalienable right to determine how they are governed.

Respectfully submitted,

FAY D. DUPUIS
City Solicitor

KARL P. KADON, III
*Counsel of Record*
Deputy City Solicitor

MARK S. YURICK
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3334

*Attorneys for Respondents*

No. 95-239

In The

# Supreme Court of the United States

October Term, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.; RICHARD BUCHANAN; CHAD BUSH; EDWIN GREENE; RITA MATHIS; ROGER ASTERINO; and H.O.M.E., INC.,

*Petitioners,*

v.

CITY OF CINCINNATI; EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; and ALBERT MOORE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF RESPONDENTS EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; and ALBERT MOORE

ROBERT H. BORK
Suite 1000
1150 17th Street, N.W.
Washington, D.C. 20036

ROBERT K. SKOLROOD
NATIONAL LEGAL FOUNDATION
6477 College Park Square
Virginia Beach, VA 23464

MICHAEL A. CARVIN*
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether an amendment to the Cincinnati city charter prohibiting the City Council from enacting laws which accord protected status or preferential treatment on the basis of homosexual conduct or orientation violates a fundamental right of non-suspect groups to seek such special protections and preferential treatment.

2. Whether such an amendment to the Cincinnati city charter is rationally related to a legitimate governmental purpose.

## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

No. 95-239

In The

# Supreme Court of the United States

October Term, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.; RICHARD BUCHANAN; CHAD BUSH; EDWIN GREENE; RITA MATHIS; ROGER ASTERINO; and H.O.M.E., INC.,

*Petitioners,*

v.

CITY OF CINCINNATI; EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; and ALBERT MOORE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF RESPONDENTS EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; and ALBERT MOORE

Respondents Equal Rights, Not Special Rights, Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore respectfully submit this brief in response to the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit filed on August 9, 1995, by petitioners Equality Foundation of Greater Cincinnati,

Inc.; Richard Buchanan; Chad Bush; Edwin Greene; Rita Mathis; Roger Asterino; and H.O.M.E., Inc.

## COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates information concerning the factual and legal background and context of this case.

### 1. The History and Factual Background of Issue 3

This case is about a disagreement between the people of Cincinnati and their elected representatives on the City Council over the question of whether or not homosexuals ought to be protected under Cincinnati's civil rights laws. On March 13, 1991, the City Council enacted Ordinance No. 79-1991, commonly known as the Equal Employment Opportunity Ordinance ("EEO Ordinance"), which prohibits the City of Cincinnati, in its capacity as a public employer, from discriminating in employment matters on the basis of, among other criteria, sexual orientation. Jt. App. 668.[1] On November 25, 1992, the City Council passed Ordinance No. 490-1992, the so-called Human Rights Ordinance ("HRO"), which prohibits discrimination in employment, housing, and

[1] References to the petition for a writ of certiorari filed by petitioners will be noted as "Pet." References to the Joint Appendix before the court of appeals will be described as "Jt. App." Joint Exhibits not included in the Joint Appendix will be referred to "Jt. Exh." The full record in the district court will be referred to as "R."



public accommodations based on, *inter alia*, sexual orientation.[2] Among other things, the HRO requires that those seeking roommates in one-bedroom apartments and devoutly religious employers and landlords accept homosexuals on an equal basis. Jt. App. 416-17; 673-79.

Following the enactment of the HRO, a group of Cincinnati citizens formed an organization called "Take Back Cincinnati" for the purpose of circulating petitions and gathering signatures sufficient to place on the ballot a proposed amendment to the Cincinnati city charter. The purpose of the charter amendment is to repeal the EEO Ordinance and the HRO insofar as both ordinances grant protected status to persons on the basis of sexual orientation, and to prevent the City Council and any City officials from according such status or other preferential treatment on the basis of sexual orientation. On November 2, 1993, following a successful petition drive to place the referendum on the ballot, the citizens of Cincinnati voted to amend the city charter by adopting Issue 3. The measure, which the electorate approved by a vote of 56,416 to 34,472, or approximately 62% to 38%, reads as follows:

> NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles,

[2] The HRO makes it unlawful to discriminate against individuals on the basis of "race, gender, age, color, religion, disability status, sexual orientation, marital status, or ethnic, national or Appalachian regional origin." Jt. App. 670.

> or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Besides the HRO and EEO Ordinance, there is no evidence of any Cincinnati program or policy that would be affected by Issue 3.

**2. The Proceedings in the District Court**

On November 8, 1993, five individual named homosexuals and two organizations – Equality Foundation of Greater Cincinnati, Inc. and H.O.M.E., Inc. ("petitioners") – filed a complaint and motion for a preliminary injunction seeking to block the amendment from taking effect on the grounds that Issue 3 allegedly violates their rights under the Equal Protection Clause and the First Amendment to the United States Constitution. Before the hearing on the preliminary injunction, the district court permitted an organization called Equal Rights, Not Special Rights ("ERNSR") and three named individuals ("respondents") to intervene in the case as defendants. ERNSR is the successor organization to "Take Back Cincinnati," and led the campaign to have Issue 3 adopted as a charter amendment.

After a one-day hearing on the motion for a preliminary injunction, the district court granted the motion and held that the petitioners had met their burden of establishing that there is a substantial likelihood that Issue 3



violates the fundamental right of homosexuals to participate equally in the political process and infringes petitioners' expressional rights under the First Amendment. Accordingly, the district court preliminarily enjoined Issue 3 from taking effect. Pet. at 89a-105a.[3]

Believing that the case raises no genuine issues of material fact and turns instead on purely legal determinations, respondents and the City of Cincinnati filed a motion for summary judgment on all counts with the district court. Petitioners, however, refused to file a cross-motion for summary judgment, and argued instead that they needed to build a factual record, especially with regard to the allegation that homosexuals are a suspect or quasi-suspect class. The district court agreed with petitioners and denied the summary judgment motions.

On August 9, 1994, after five days of testimony, the district court permanently enjoined the charter amendment and held that Issue 3 infringes petitioners' right to participate equally in the political process; that gays, lesbians and bisexuals belong to a quasi-suspect category triggering the application of heightened scrutiny analysis under the Equal Protection Clause; and that Issue 3 gives effect to private prejudice and is insufficiently linked to any legitimate governmental interest. With respect to petitioners' First Amendment claims, the district court held that Issue 3 violates petitioners' First Amendment right to free speech and association and their right to petition the government for redress of grievances. The

---

[3] On January 12, 1994, some two months after 62% of the electorate had voted in favor of Issue 3, the City Council defeated by a vote of 5-4 a measure that would have repealed the HRO.

district court also held that Issue 3 is unconstitutionally vague.[4]

The district court also opined that Issue 3 encourages private prejudice and is designed to harm homosexuals, who the court believed were politically unpopular. Pet. at 39a-40a, 40a n.7, 42a and 75a. The district court made clear that its conclusions regarding the intent and effect of Issue 3 were based solely on its text. Pet. at 75a-76a. Due to binding circuit precedent, the district court expressly eschewed any attempt to discern the voters' "intent" – prejudicial or otherwise. Pet. at 40a n.7. Although the scope and manner of the Issue 3 campaign concededly were irrelevant to the legal issues presented, the district court nonetheless found that ERNSR campaign materials were "grossly inaccurate" and "riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals." Pet. at 40a and 74a.

The only examples the district court could find to support these accusations related to its own rhetorical disagreement with the Issue 3 campaign on such matters as whether a group's inclusion in the protection of civil rights laws constitutes "special rights," whether homosexuals differ from other groups who are protected because their class is defined by sexual behavior, and

[4] The opinions of the district court are reported at 860 F. Supp. 417 (S.D. Ohio 1994) (granting permanent injunction) and at 838 F. Supp. 1235 (S.D. Ohio 1993) (granting preliminary injunction) and reprinted in Pet. at 23a-88a and 89a-105a, respectively.



whether the Supreme Court's suspect class analysis provides an appropriate guide for determining which groups are deserving of protection under civil rights laws. Pet. at 40a-41a. This is simply disagreement about legal and political rhetoric, and has nothing at all to do with "misrepresentations about homosexuals" or their lifestyle. Pet. at 40a. The reason the district court was unable to cite misrepresentations about the lifestyles or practices of homosexuals is because every public pronouncement of the ERNSR campaign dealt directly with the legal and political question of whether homosexuals should receive special civil rights protections.[5]

### 3. The Proceedings in the Court of Appeals

On May 12, 1995, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the district court and vacated the district court's permanent injunction against implementation and enforcement of Issue 3, thereby permitting the citizens of Cincinnati, instead of the City Council, to determine democratically the efficacy

[5] The undisputed evidence established that the issue of AIDS was mentioned by anyone, even indirectly, exactly four times in the campaign. The only other discussion of any aspect of homosexual lifestyle or sexuality was confined to a few pamphlets and books which, the undisputed testimony established, were distributed to no more than 20 people, were never referred to by anyone associated with ERNSR, and thus could not possibly have had any effect of voters' attitudes on Issue 3. *See* Jt. App. 418-19; 429-30; 471-73. *See also* Jt. Exh. V, at 114-16, 156-67. In all events, the undisputed evidence showed that there was no "unreliable" or false factual "data" in any of these pamphlets.

of granting protected status to homosexuals under the City's antidiscrimination laws. Pet. at 2a-22a and 23a-88a.[6] The court of appeals concluded at the outset of its opinion that since "most, if not all, of the lower court's findings . . . constituted ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and/or fact, and findings designated to support 'constitutional facts' " – such findings were subject to plenary review. Pet. 9a.[7]

Rejecting the district court's contention that Issue 3 denied petitioners their "fundamental right to equal participation in the political process," the court of appeals held that Issue 3 deprived "no one of the right to vote, nor did it reduce the relative weight of any person's vote," and enabled homosexuals to continue to vote for City Council members and to lobby those Council members concerning issues of interest. Pet. at 17a-18a. Importantly, the only effect upon the citizens of Cincinnati mentioned by the

---

[6] The opinion of the court of appeals is reported at 54 F.3d 261 (6th Cir. 1995) and is reprinted in Pet. at 2a-22a. The Court of Appeals issued an Order on June 14, 1995, which is reprinted at Pet. at 1a, granting a stay of its mandate through August 10, 1995.

[7] For example, the trial judge made the following "findings": (1) Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic; (2) sexual orientation is a characteristic which exists separately and independently from sexual conduct or behavior; (3) sexual behavior is not necessarily a good predictor of a person's sexual orientation; and (4) ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals. Pet. at 37a-40a.



district court "was to render futile the lobbying of Council for preferential enactments of homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority" – an effect which the Sixth Circuit declared, "does not rise to constitutional dimensions." *Id.* The Sixth Circuit concluded "that those who opposed Issue 3 simply lost one battle of an ongoing political dispute." *Id.* Moreover, far from "altering" the political process within the City of Cincinnati, Issue 3 is a straightforward and unexceptional example of how the political process works. R. 59, at 16.

The court of appeals also rejected the district court's "novel" conclusion that homosexuals comprise a "quasi-suspect" class. Pet. at 11a. Joining "every circuit court which has addressed the issue," the Sixth Circuit concluded that "homosexuals are entitled to no special constitutional protection . . . because the conduct which places them in that class is not constitutionally protected." *Id.* The Sixth Circuit opinion rejected the notion that homosexuals are distinguished by their "sexual orientation" rather than by any particular conduct, and noted that neither Issue 3 nor other laws can successfully be drafted to burden or penalize a particular group "whose identity is defined by subjective and unapparent characteristics such as innate desires, drives and thoughts." Pet. at 13a.

Lastly, the court of appeals held that the district court "erroneously ruled that [Issue 3] did not rationally relate to any permissible purpose" and that there were legitimate governmental interests advanced in Issue 3. Pet. at 20a-21a. The court of appeals concluded that Issue 3

"furthered a litany of valid community interests," including: (1) the encouragement of associational liberty of Cincinnati citizens by eliminating exposure to the punishment mandated by the HRO against those who elected to disassociate themselves from homosexuals; (2) the reduction of governmental regulation of the private and economic conduct of Cincinnati citizens; (3) the expansion of the degree of personal autonomy and collective popular sovereignty legally permitted with respect to questions of individual conscience, private religious convictions and other profoundly personal and deeply fundamental moral issues; and (4) the return of the municipal government to a position of neutrality with respect to homosexuality. *Id.*[8] The court of appeals also properly rejected the district court's conclusion that Issue 3 violated the First Amendment and was void for vagueness. Petitioners do not seek review of these rulings or the court's rejection of their quasi-suspect class argument.

During the pendency of the Sixth Circuit appeal, on March 8, 1995, the City Council amended the HRO to eliminate any protections for "sexual orientation" discrimination, thus clarifying that neither heterosexuals nor homosexuals may seek the special protections of that law.

---

[8] In addition, the court of appeals also noted, "Even if [Issue 3] is construed to reflect the majority's moral views respecting homosexuality, the Supreme Court has dictated such articulations to constitute a legitimate governmental interest. *Bowers v. [Hardwick]*, 478 U.S. [186,] at 196, 106 S. Ct. 2846 [(1986)](a state criminal sodomy statute is justified as an expression of the belief of the electoral majority that homosexuality is immoral)." Pet. a' 20a n.10.



## REASONS FOR HOLDING OR DENYING THE WRIT

### A. The Fundamental Political Rights Issue May Be Held Pending The Court's Resolution Of *Romer v. Evans*.

Petitioners first seek review of the Sixth Circuit's determination that Issue 3 does not deny homosexuals their "fundamental right to participate equally in the political process." In *Romer v. Evans*, No. 94-1039, *cert. granted*, ___ U.S. ___, 115 S. Ct. 1092 (1995), the Court is currently reviewing the Colorado Supreme Court's determination that a similar amendment to the Colorado state constitution violates this "fundamental right." Since that case presents a similar "fundamental political rights" issue, respondents agree that it would be appropriate to hold this case pending the Court's resolution of *Romer*. It is important to note, however, that there is a significant difference between the "fundamental political rights" issue in *Romer* and that presented in this case. Consequently, while a ruling upholding Colorado's Amendment 2 necessarily demonstrates the validity of Issue 3 here, a decision striking down Colorado's Amendment 2 does not suggest any infirmity in Issue 3. A brief description of the petitioners' "fundamental political rights" theory, and the issues it raises, makes this clear.

Petitioners contend that Issue 3 denies homosexuals the right to participate politically solely because the vehicle for resolving the question whether homosexuals are entitled to special civil rights protections was a popular referendum as opposed to a decision by the local City Council. Specifically, according to petitioners, the people

of Cincinnati cannot directly resolve this important public policy issue through the Charter Amendment referendum process because, under Ohio law, the elected representatives on the City Council would thereby be prevented from granting the special protections forbidden by Issue 3. Since the City Council is thus disabled under state law from granting petitioners the laws they desire, petitioners' lobbying would be "futile" on that particular issue and thus their constitutionally-guaranteed right to lobby or participate politically would be denied. Accordingly, charter amendments and similar popular referenda cannot be used to directly resolve public policy issues affecting homosexuals, or to decide any other substantive issue which is not "neutral" with respect to any other group in American society. Under this logic, the Constitution would require that such substantive matters be left to the wholly unfettered discretion of locally elected officials because any restriction by the electorate on those officials' law-making authority would prevent affected groups from lobbying to override the popular will. Consequently, the only constitutionally permissible role for such popular referenda is to establish "neutral principles" for government structures or the political process. The plaintiffs-respondents in *Romer* make an analogous attack on the similarly-worded Amendment 2 to the Colorado state constitution.

The flaws in this argument are manifest and discussed at length in our amicus brief in *Romer*, a copy of which has been provided to petitioners here. Briefly, neither Issue 3 nor Colorado's Amendment 2 erects any obstacle whatever to homosexuals' right to lobby, vote, or



otherwise participate politically on a fully equal basis. Neither amendment even addresses, much less modifies, any aspect of the electoral, political or legislative process and homosexuals retain full and equal access to all legislators on all subjects. The only alleged "obstacle" to homosexuals' political participation is the fact that the legislators being lobbied will no longer have authority to grant homosexuals the special civil rights protections they desire. But the Constitution guarantees only equal access to legislators, it plainly does not further guarantee that those legislators' policy-making authority will remain unfettered by the contrary desires of the electorate, as expressed in a binding referendum.

Under the Federal Constitution, the electorate is entirely free to make important public policy decisions and to make those decisions binding on their employee representatives. Since our constitutional system is founded on the "critical postulate that sovereignty is vested in the people," it cannot possibly offend the Constitution when the people exercise that sovereign authority by circumscribing their representatives' power to pass certain undesirable laws. *U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, 115 S. Ct. 1842, 1851 (1995).[9] Indeed, the *raison d'être* of all constitutions – local, state and federal –

---

[9] *See also Martin v. Hunter's Lessee*, 14 U.S. 304, 324 (1816) ("The Constitution of the United States was ordained and established . . . as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority.").

is to have the people establish their own form of government and, as part of their social contract, to limit the permissible ends of their representatives' lawmaking efforts. *See, e.g.*, U.S. Const. amend. I ("*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to assemble, and to petition the Government for a redress of grievances.") (emphasis added). In short, since the Federal Constitution concededly does not require special civil rights laws protecting homosexuals, and since the legislatures of Colorado and Cincinnati are thus entirely free to repeal such civil rights protections, the people of Colorado and Cincinnati are necessarily also free to repeal those protections. *Thornton*, at 1858 n.19 ("We are aware of no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly through amendment of the state Constitution."). *See also Crawford v. Board of Educ.*, 458 U.S. 527, 538 (1982) ("[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.").

While the arguments put forth by respondents in *Romer* cannot be squared with these basic constitutional principles, it is at least possible, in the state-wide context presented in that case, to articulate some political effect stemming from Amendment 2. Specifically, in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 478-79 (1982), the Court held that, in light of Washington's highly unusual scheme of "emphatically . . . vest[ing] in local school



boards" *all* control over educational issues, a state-wide initiative to ban integrative busing "worked a major reordering of the State's educational decisionmaking process." The Court then concluded that this state-wide initiative had a potential effect on the political process because it transferred local "decisionmaking authority over the question [to] a new and remote level of government." *Id.* at 483.

*Washington* provides no support for the decision of the Colorado Supreme Court in *Romer* because *Washington* reaffirmed that states are "accorded the widest latitude in ordering their internal government processes" and emphasized that the *sole* constitutional deficiency in the Washington amendment was that it "rests on distinctions based on race." *Id.* at 476, 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)). In *James* – a case utterly irreconcilable with petitioners' argument – the Court had earlier established that the condemnation of popular referendum in *Hunter v. Erickson*, 393 U.S. 385 (1969), applied only if the referenda imposed unique political obstacles on *racial* minorities. *James*, at 141 ("Unlike the Akron referendum provision in *Hunter*, it cannot be said that the *James* referendum rests on distinctions based on race. . . . The present case could be affirmed only by extending *Hunter* and this we decline to do.").[10]

---

[10] The *Washington* opinion also repeatedly emphasizes that *Hunter's* condemnation of popular initiatives was limited to those which imposed a racial classification burdening racial minorities. *See, e.g.*, 458 U.S. at 486 ("*Hunter* . . . rested on a principle that has been vital for over a century – that 'the core of the Fourteenth Amendment is the prevention of meaningful and

Thus, Colorado's Amendment 2 can be invalidated only if the Court overrules both *James* and the legion of cases establishing that states are free to constrain the discretion of their political subdivisions and extends *Washington* to nonracial popular referendum. But even such a stark reversal of the Court's precedent and prior devotion to popular sovereignty would still afford no basis for invalidating popular referenda, such as Issue 3, that affect only *local* communities. Even in the unique situation presented in *Washington*, the only potential effect on the political process, as noted, was that it transferred decisionmaking authority from the local to state level. Obviously, when local referenda decide questions for the relevant political jurisdiction, local decisionmaking remains at a local level. The only change is that the citizenry, rather than elected officials, make the challenged decision. That being so, even if *Washington* was expanded to condemn all state-wide referenda that interfere with local decisionmaking, such a holding still would not suggest any constitutional infirmity with purely local referenda such as Issue 3. Any such infirmity would necessarily require a different rationale; *i.e.*, that it is constitutionally impermissible for local electorates to use

---

unjustified official distinctions based on *race*' ") (emphasis added and internal quotations omitted); *id.* at 474 ("Given the *racial* focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.") (emphasis added); *id.* at 474 ("As in *Hunter*, then, the community's political mechanisms are modified to place *effective* decisionmaking authority over a *racial* issue at a different level of government.") (emphasis added); *id.* at 485 ("[T]he charter amendment at issue in *Hunter* dealt in explicitly *racial* terms with legislation designed to benefit minorities 'as minorities'. . . . ") (emphasis added).



their local constitutions to limit the lawmaking authority of local representatives. As noted, such as rationale cannot conceivably be gleaned from *Washington* or any other case and is irreconcilably at odds with this Nation's political tradition of town hall meetings and constitutional tradition of a limited government with powers delegated by "We, the people." *See, e.g.*, U. S. Const. pmbl.

In short, a decision in *Romer* that Colorado's Amendment 2 does not infringe any fundamental political right necessarily means that Issue 3 is also constitutionally sound. In contrast, condemnation of Colorado's statewide constitutional amendment provides no basis for invalidating Issue 3, a purely local referendum that cannot implicate the distribution of political power between the state and local governments. Accordingly, certiorari should be granted in this case only if *Romer* strikes down Amendment 2, in order for this Court to directly resolve the separate question of whether a local citizenry's control of local representatives somehow runs afoul of the Constitution. There would be no occasion or need for the Court's review of this case, however, if Amendment 2 is upheld under this Court's well-established precedent.

### B. The Lower Court's Rational Basis Judgment Does Not Warrant This Court's Review.

Petitioners ask this Court to review the lower court's finding that Issue 3 survives "rational basis" review. Review of this question is plainly not warranted, however, because the Sixth Circuit's straightforward finding concerning the rationality of Issue 3 presents no legal questions of substantial or recurring importance and

reflects no confusion, much less disagreement, among the lower federal courts.

Unlike the "fundamental political rights" issue, the decision below on Issue 3's rationality is entirely consistent with the Colorado Supreme Court's discussion of the interests served by Amendment 2. In *Evans v. Romer*, 882 P.2d 1335, 1342-44 (1994) (*"Evans II"*), the Colorado Supreme Court found that Amendment 2 serves compelling (and therefore necessarily legitimate) governmental interests in protecting religious liberty and associational privacy. Nor do petitioners point to any other lower court decisions that take any different approach to rational basis review than that employed by the Sixth Circuit. Accordingly, resolution of the fact-bound question of Issue 3's rationality is not of any general importance and is not necessary to provide guidance to the lower federal courts.

Petitioners do suggest that the Sixth Circuit's rational basis analysis conflicts with the precedent of this Court. To the contrary, the decision below was simply a straightforward application of well-established rational basis principles to a law that the court correctly found "furthered a litany of valid community interests." Pet. App. 20a. Civil rights laws protecting homosexuals necessarily deny employers and landlords their traditional freedom to associate with whomever they please and to attach significance to a sexual behavior or lifestyle that they may believe is inappropriate or sinful. By prohibiting such government coercion, Issue 3 restores citizenry's traditional freedom to associate and to act on sincerely-held religious or moral beliefs concerning the proprietary of certain behavior. Reducing government regulation



always is rational because it enhances individual freedom and preserves scarce taxpayer resources. Here, moreover, the reduction of government regulation is particularly compelling because the regulation being overturned interferes so directly with "deeply personal choices and beliefs which are necessarily imbued with questions of individual conscience, private religious convictions, and other profoundly personal and deeply fundamental moral issues." *Id.* at 20a-21a. Eliminating the liberty of landlords and employers to take account of homosexuality sends the unmistakable message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider. By restoring government neutrality on this difficult and divisive moral issue, Issue 3 promotes freedom and diversity by allowing different groups in the community to hold, and act on, different views on this question. In short, Issue 3 serves all the interests that have led 42 states and the United States Congress to deny homosexuals the civil rights protections afforded many other groups.

Petitioners do not and cannot contest that enhancing associational liberty and reducing government regulation and expenditures are legitimate interests. Nor can they deny that the inexorable effect of Issue 3 is to further these interests and enhance freedom. Thus, there is no dispute that Issue 3 is rationally related to legitimate government interests, which should end any question of the amendment's validity under rational basis review. Nevertheless, petitioners suggest that the appellate court should have struck down Issue 3 because (1) these legitimate interests did not actually motivate the supporters of Issue 3, who the campaign reveals were truly motivated

by irrational "anti-gay antipathy" and (2) some of the legitimate interests supporting Issue 3 would also support a repeal of civil rights protections for groups other than homosexuals. Neither assertion is factually accurate nor relevant to any proper rational basis review, under bedrock principles already established by this Court.

First, it is black-letter law that the Court will not invalidate enactments which serve a legitimate purpose by speculating or "finding" that the legislature or electorate enacting the law is too stupid or bigoted to actually consider any such interests. To the contrary, it is well established that a law "must be upheld against equal protection challenge if there is any *reasonably conceivable* state of facts that *could* provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, ___ U.S. ___, 113 S. Ct. 2096, 2101 (1993) (emphasis added). *See also Heller v Doe*, ___ U.S. ___, 113 S. Ct. 2637, 2642-43 (1993). Thus, the subjective motivations of the laws' proponents are irrelevant to rational basis review and cannot serve to invalidate a law which objectively serves any conceivable legitimate interest. *See also Crawford*, 458 U.S. at 543-45 (declining to look beyond the purposes of the proposition "as stated in its text").

In any event, contrary to what petitioners suggest, the district court, because of binding Sixth Circuit precedent prohibiting analysis of voters' motivation outside the racial context, expressly eschewed any effort to glean from the campaign or background of Issue 3 any insight into voter purposes or motives. Pet. at 40a n.7. Rather, all the district court's negative comments about the effect and intent of Issue 3 were based on what was "inherent" in the "very structure of Issue 3" and the "very concept of



such a law." Pet. at 75a.[11] Accordingly, in conducting their *de novo* review of this purely legal question concerning Issue 3's text, the Sixth Circuit properly recognized that the district court's conclusions about Issue 3's "desire to harm politically unpopular groups" and "give effect to private prejudices" constituted nothing more than attaching pejorative labels to the concededly legitimate interests served by Issue 3. In the district court's view, private reservations about homosexuality are nothing more than "private prejudices," and to fail to affirmatively outlaw such reservations "gives effect to" such "biases" and thus, *ipso facto*, "harms" politically "unpopular" gays. Thus, the district court's and petitioners' characterization of Issue 3 is simply another (albeit quite derisive) way of saying that the amendment overturns laws prohibiting private citizens from acting on their moral reservations about homosexuals, a group that petitioners believe is not particularly popular in Cincinnati. The court of appeals properly recognized that such negative labeling simply reflects the district court's personal disagreement with the Cincinnati electorate's policy choices and that this disagreement cannot cast doubt on the validity of the legitimate interests served by Issue 3.

---

[11] Of course, if the district court had made any factual findings concerning the particular circumstances of the Issue 3 campaign or the Cincinnati electorate, those findings would have no significance outside of that city and thus are unworthy of this Court 's review.

Petitioners also criticize the court below for accepting "extremely generalized" rationales in support of removing homosexuals' special civil rights protections because such justifications "could equally support" denying other groups similar protections. Pet. at 23. It is a basic principle of rational basis review, however, that the underinclusiveness of a classification affords no grounds for questioning its validity.[12] This is particularly true where, as here, the classification concerns eligibility for scarce public benefits such as special protections under civil rights laws.[13] Accordingly, contrary to petitioners' suggestion, legislatures may exclude, for example, drug addicts from the protections of civil rights laws without being constitutionally obliged also to exclude women and racial minorities from such protections, even though the freedom-enhancing reasons justifying an exclusion of drug addicts could also support excluding these other groups. In addition, homosexuality fundamentally differs

---

[12] *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("If the classification has some rational basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice, it results in some in equality.") (citations and internal quotations omitted).

[13] *See, e.g., United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[T]he task of classifying persons . . . for benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.") (citations and internal quotations omitted).



from other protected criteria, such as skin color and gender, because it is a behavior and thus something to which eminently reasonable people can attach negative significance. Moreover, were Issue 3 deemed to be irrational, then the United States Congress is also currently violating equal protection guarantees, because it has refused to extend to homosexual orientation or behavior the same civil rights protections it provides for race, familial status, handicap, etc., and the only justifications for such an exclusion are those which supported Issue 3.

Finally, we note that Issue 3's rationality is conclusively demonstrated by this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In that case, the Court held that a law prohibiting sodomy by homosexuals was supported by the state's legitimate interest in reflecting the majority's views that "homosexual sodomy is immoral and unacceptable." *Id.* at 196. If the government has a rational and legitimate basis for imprisoning monogamous adults whose only crime is consensual sexual behavior in the privacy of their own homes, it cannot be irrational for the government to take the far less draconian step of simply refraining from penalizing private actors who prefer not to rent their apartments to people who engage in such behavior. Indeed, it is manifestly irrational to conclude that the government *must* encourage and sanction homosexual relationships by granting them affirmative civil rights protections, but, at the same time, conclude that the government is entirely free to criminally penalize the natural, consensual results of those relationships through sodomy laws. Yet this is

precisely the state of constitutional law that would result from acceptance of petitioners' rational basis arguments.

## CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari with respect to the fundamental rights issue should be held pending this Court's resolution of *Romer*. The petition for writ of certiorari should be denied with respect to the second question presented, concerning the rational basis of Issue 3.

Respectfully submitted,

ROBERT H. BORK
Suite 1000
1150 17th Street, N.W.
Washington, D.C. 20036

ROBERT K. SKOLROOD
National Legal Foundation
6477 College Park Square
Virginia Beach, VA 23464

MICHAEL A. CARVIN*
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Counsel of Record

No. 95-239



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, AND H.O.M.E., INC.,

*Petitioners,*

—v.—

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., AND ALBERT MOORE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF PEOPLE FOR THE AMERICAN WAY, ASIAN AMERICAN DEFENSE AND EDUCATION FUND, GAY AND LESBIAN ADVOCATES AND DEFENDERS, HUMAN RIGHTS CAMPAIGN FUND, JAPANESE AMERICAN CITIZENS LEAGUE, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL LESBIAN AND GAY LAW ASSOCIATION, NOW LEGAL DEFENSE AND EDUCATION FUND, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, AND UNION OF AMERICAN HEBREW CONGREGATIONS, AS *AMICI CURIAE* IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

ELLIOT M. MINCBERG
*Counsel of Record*
JUDITH E. SCHAEFFER
People For the American Way
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-2381
*Attorneys for Amici Curiae*

9pp

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASE



STATUTE





## INTEREST OF AMICI CURIAE*

PEOPLE FOR THE AMERICAN WAY (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members across the country, including in Ohio. People For has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect the civil rights of gay men and lesbians. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation, and conducts programs and studies directed at reducing problems of bias, injustice and discrimination. The instant case is of particular importance to People For because the Court of Appeals' decision improperly embraced the unacceptable concept that gay men and lesbians are second-class citizens who may be excluded from this country's political processes and denied its legal protections. This Court should grant *certiorari*, reverse that decision, and affirm the fundamental principle that all persons, including gay men and lesbians, are entitled to the equal protection of the law.

* All *amici* filed briefs *amicus curiae* with this Court in *Romer v. Evans*, No. 94-1039.

THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF) is a civil rights organization founded in 1974 that addresses critical issues facing Asian Americans though community education, advocacy, and litigation involving immigrants' rights, voting rights, labor and employment rights, and environmental justice. AALDEF also represents victims of anti-Asian violence and Japanese Americans who were incarcerated in U.S. camps during World War II. AALDEF supports the fundamental rights of all persons to equal access and participation in the political process.

GAY AND LESBIAN ADVOCATES & DEFENDERS (GLAD) is a non-profit public interest law firm which represents gay men, lesbians, and persons with HIV disease in impact litigation throughout New England. GLAD has participated as counsel or as *amicus curiae* in many cases in both the state and federal courts in which the constitutional rights of lesbian and gay individuals was at issue. Thus, GLAD is well qualified to appear as *amicus curiae* before this Court.

THE HUMAN RIGHTS CAMPAIGN FUND (HRCF), the nation's largest lesbian and gay political organization, works to end discrimination, secure equal rights, and protect the health and safety of all Americans. HRCF lobbies the federal government on gay, lesbian and AIDS issues; educates the general public; participates in election campaigns; organizes volunteers; and provides expertise and training at the state and local level.

THE JAPANESE AMERICANS CITIZENS LEAGUE (JACL), founded in 1929, is the oldest and largest Asian Pacific American civil rights organization in the nation. The mission of the JACL is to uphold the civil and human rights of Americans of Japanese ancestry and all people. The JACL



played a prominent role in obtaining redress for Japanese Americans who were interned in concentration camps during World War II. The JACL has also worked to combat discrimination on the basis of race, ethnicity, religion, gender, and sexual orientation, to reduce the incidence of hate crimes, and to protect the rights of all persons to equal participation in the political process.

THE NATIONAL CENTER FOR LESBIAN RIGHTS (NCLR) is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of their sexual orientation. NCLR is particularly well-suited to offer *amicus* assistance to this Court in this matter as NCLR attorneys have a litigation history which demonstrates a strong commitment to securing the civil rights of lesbians and gay men. NCLR participated as *amicus* before this Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, et. al.* NCLR attorneys have litigated numerous cases in appellate and trial courts where the rights of lesbians and gay men are threatened.

THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION (NLGLA) was founded in 1988 as a national association of lawyers, judges, and other legal professionals, law students and affiliated lesbian and gay legal organizations. Its mission is to promote justice within the legal profession for lesbians and gay men in all their diversity. NLGLA has been an affiliate of the American Bar Association since August 1992. It has participated as *amicus curiae* in numerous state and federal court actions involving or implicating the rights of lesbians and gay men.

THE NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF) is a leading national non-profit civil rights organization that provides a broad range of legal and educational services in support of women's efforts to eliminate gender-based discrimination. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. NOW LDEF opposes Issue 3 because it jeopardizes the ability of any group that suffers discrimination to obtain civil rights protection.

THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND (PRLDEF) was founded in 1972 to protect and ensure the civil rights of Puerto Ricans and other Latinos. PRLDEF is committed to equal protection of the laws for all persons and strongly opposes discrimination against lesbian, gay, and bisexual people, including any attempt to restrict political participation on the basis of sexual orientation.

THE UNION OF AMERICAN HEBREW CONGREGATIONS (UAHC) is a religious and educational organization founded in 1873 and dedicated to the principle of Reform Judaism. The UAHC adopted a resolution in 1977 calling for the end of discrimination based on sexual orientation and has been a consistent supporter of the rights of gay men and lesbians for freedom and dignity. The President of the UAHC, Rabbi Alexander Schindler, has publicly noted the obligation of Jews to remember their history in this regard: "We who were *marranos* in Madrid, who clung to the closet of assimilation and conversion in order to live without molestation . . . cannot deny the demand for gay and lesbian visibility."

The parties have consented to the filing of this brief; their letters to that effect have been filed separately with the Court.



## REASONS FOR GRANTING THE PETITION

*Amici* organizations file this brief in support of the petition for a writ of certiorari in *Equality Foundation et al. v. City of Cincinnati et al.*, No. 95-239, which is currently pending before the Court. At issue in *Equality Foundation* is the constitutionality of a charter amendment which bars the City of Cincinnati from adopting or enforcing any ordinance, regulation, rule or policy that would, *inter alia*, provide "protected status" to lesbians, gay men and bisexuals. The measure, known as Issue 3, is virtually identical to the Colorado constitutional amendment, known as Amendment 2, currently before the Court in *Romer v. Evans*, No. 94-1039, in that it imposes a wholesale ban on government from providing legal protections (such as the prohibition of discrimination in employment) to a targeted class of citizens on the same basis as it provides those protections to all others. For the reasons stated in their respective briefs filed with the Court in the similar case of *Romer v. Evans*, *amici* believe that the issues presented in *Equality Foundation* are of critical importance and merit this Court's review.

Additionally, this case squarely presents the Court with the opportunity to address a second question, also presented and briefed in *Romer*, of whether measures such as Issue 3 lack a rational basis and therefore violate the Equal Protection Clause even under the Court's most lenient standard of review. Here, after a full trial, the district court held that Issue 3 impermissibly gives effect to private prejudice and does not rationally further a legitimate government interest. The Sixth Circuit avoided any discussion of the district court's finding of private prejudice but reversed and held that Issue 3 furthers various legitimate governmental interests. Because the courts below directly addressed the question of whether Issue 3 lacked a rational basis, plenary review of the Sixth Circuit's

ruling on the basis of a complete record will enable the Court fully to consider the important question, also present in *Romer*, of the relationship between private prejudice and rational basis review under the Equal Protection Clause. *Amici* would welcome the opportunity to brief the Court on the merits of why this charter amendment does not rationally further any legitimate government interest, should the Court grant review in this case.

## CONCLUSION

For all of the reasons stated above, *amici* urge this Court to grant the Petition and issue a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ELLIOT M. MINCBERG
*Counsel of Record*
JUDITH E. SCHAEFFER
People For the American Way
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-2381

*Attorneys for Amici Curiae*

(6)

95-239

No. 95-

Supreme Court, U.S.
FILED
SEP 11 1995
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

---

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

*Petitioners,*

-v.-

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

## BRIEF OF THE OHIO HUMAN RIGHTS BAR ASSOCIATION, THE LEAGUE OF WOMEN VOTERS OF THE CINCINNATI AREA, LOG CABIN REPUBLICANS, AND THE ANTI-DEFAMATION LEAGUE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

---



ALFRED COWGER
(Counsel of Record)
TIMOTHY J. DOWNING
Erieview Plaza
1301 East Ninth Street
Seventeenth Floor
Cleveland, Ohio 44114
(216) 523-6865
*Counsel for Amici Curiae*

22 pp

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

No. 95-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

---

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

*Petitioners,*

-v.-

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

## BRIEF OF THE OHIO HUMAN RIGHTS BAR ASSOCIATION, THE LEAGUE OF WOMEN VOTERS OF THE CINCINNATI AREA, LOG CABIN REPUBLICANS, AND THE ANTI-DEFAMATION LEAGUE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

---

## INTEREST OF THE AMICI

The Ohio Human Rights Bar Association (OHRBA) is a state-wide bar association dedicated to improving the legal rights of lesbians, gay men and bisexuals and to educational and litigation programs that will accomplish that end. OHRBA has participated as amicus in the lower court in this case and has similarly participated in other lawsuits affecting gay and lesbian citizens in Ohio.

The League of Women Voters of the Cincinnati Area is an Ohio not-for-profit corporation and a grass roots, non-partisan political organization that seeks to encourage the informed and active participation of citizens in government and to influence public policy through education and advocacy, including advocating public policies that protect basic human rights. The League has participated as amicus in various lawsuits affecting human rights.

Log Cabin Republicans (LCR) is the nation's largest partisan organization representing gay and lesbian individuals, with 43 chapters in 35 states and over 10,000 members. Log Cabin Federation of Ohio is a chartered chapter of LCR with members from across the state of Ohio. As part of its mission, LCR strongly supports efforts to ensure the full constitutional rights of gay and lesbian Americans, including the right to petition their government.

The Anti-Defamation League (ADL) is one of the oldest civil rights organizations in the United States. It was founded in 1913 to combat anti-Semitism and to promote good will among all races, ethnic groups and religions. As set forth in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." For more than eighty years, ADL has been active in the fight against discrimination in employment, housing, education and public accomodations.

## SUMMARY OF THE ARGUMENT

This Court has already undertaken in *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995), the task of determining whether Amendment 2 to the Colorado Constitution violates the Equal Protection Clause of Fourteenth Amendment to the United States Constitution. In *Romer*, the state courts addressed whether Amendment 2 impermissibly burdens a fundamental right to equal political participation but did not address whether the measure is supported by a rational basis.

*Certiorari* is particularly warranted in this case, which challenges a nearly identical amendment to the Cincinnati Charter, because both the United States District Court and Sixth Circuit Court of Appeals fully addressed *both* the rational basis and fundamental rights theories of relief and the District Court made detailed findings of fact. For example, both Amendment 2 and Issue 3 use the phrase "homosexual, lesbian, or bisexual orientation..." but only in the instant case did the trial court undertake to define sexual orientation and determine that the classification based on sexual orientation in Issue 3 reflected private prejudice and was too attenuated to any legitimate governmental interest in its application of the rational basis test.

The Sixth Circuit, in an erroneous and controversial move, rejected the trial court's analysis of all issues and applied *de novo* review to all factual and legal conclusions. Accepting *certiorari* and permitting full argument in this case (in addition to *Romer*) will guarantee full consideration during this Supreme Court term of the many factual and legal issues that properly underlie rational basis review.

Amici organizations urge a rule of law that reflects trust in the democratic political process. Federal Courts have a limited but important role in that regard. Federal Courts



nurture that trust by insuring access to a level playing field. Issue 3 denies to lesbian and gay voters a level playing field. The measure denies to them the ability to seek protection through politics from the abuse of both public and private discrimination. Issue 3 targets a specific group of voters and expressly excludes them from seeking equal protection of the laws - even in the face of a proven need for protection - from their representatives in government. Issue 3 is therefore a violation of the constitutional guarantee of "equal protection of the laws".

The express purpose of Issue 3 is to restrict gay political influence and to enhance the political power of the majority voters. This is not a legitimate governmental purpose. No rational basis exists that can justify excluding gay, lesbian and bisexual citizens - and no others - from seeking civil rights protection or other redress for harm. The sweeping Sixth Circuit ruling ignores the detailed findings of fact of the trial court and fails to follow the rational basis precedents of this Court. The decision has set the stage for measures similar to Issue 3 that can be directed against any unpopular minority group. The issue is ripe for review by this Court under a rational basis standard as well as the heightened scrutiny for violations of fundamental rights urged in *Romer* and by the petitioners in this case.

## ARGUMENT

### I. ACCEPTANCE OF THIS CASE FOR REVIEW AND ARGUMENT IN ADDITION TO ROMER WILL BRING LOWER COURT RULINGS ON RATIONAL BASIS BEFORE THIS COURT AND THEREBY INSURE FULL CONSIDERATION OF ALL RELEVANT FACTS AND ARGUMENTS BEARING ON THESE ANTI-GAY AMENDMENTS

The amici organizations urge that this Court grant *certiorari* in this case in order to fully consider - with the assistance of broader lower court rulings - the issues already scheduled for plenary review in *Evans v. Romer*. Based on the question presented in *Romer*, the parties have briefed two theories of relief: that Amendment 2 (1) violates the fundamental right of equal political participation; and (2) has no rational basis. The rulings at the trial and appellate levels in the state courts in *Romer*, however, only specifically addressed the political participation theory.

Significantly, the trial court in this federal action made factual findings and conclusions of law under both theories. The Sixth Circuit Court of Appeals also addressed both theories. Thus, by accepting this case for plenary review, this Court in a single term, will have the opportunity to explore fully the factual findings as well as the legal analysis based on those findings on this issue of national concern.

The Sixth Circuit's opinion represents the first federal appellate ruling -- and the first ruling nationwide - upholding a measure that restricts the rights of lesbian and gay citizens to seek civil rights protection through the political process. If left unchanged, the holding of this sweeping decision will support official discrimination against lesbian and gay citizens in



government programs, educational institutions and civil service jobs as well as in private housing, employment and public accommodations. Indeed, the Sixth Circuit decision has been compared to another case that served to promote and legitimize rather than reduce discrimination against another minority, *Plessy v. Ferguson*, 163 U.S. 256 (1896) (upholding racially segregated public accommodations). Further, among the membership of the amici organizations are persons of Appalachian heritage, single mothers, older people and people of many religious traditions that do not have protection against discrimination in all settings under existing federal and state law. The Sixth Circuit ruling could put at risk any of these minority groups should a measure structured like Issue 3 target their ability to seek protection from discrimination and other wrongdoing.

### II. ISSUE 3 BURDENS PETITIONERS' FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION BY DENYING EQUAL ACCESS TO THE POLITICAL PROCESS

Amici organizations claim no right to the realization of any political objectives. Indeed, the petitioners and amici seek only a level playing field. Like all other citizens, they deserve access on an equal basis to the decision making process. Issue 3 denies that equal access.

Changing the very structure of the political process solely to empower majority voters and reduce the power of targeted minority voters violates the essence of our democratic system confined, as it must be, by an overarching respect for the constitutional rights of its citizens. Further, the fact that Issue 3 is itself the result of a citizen initiative lends it no extra protection:

> One's right to life, liberty and property...and other fundamental rights may not be

> submitted to vote; they depend on the outcome of no elections.

*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Moreover, close judicial scrutiny should be given to any "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938).

The Sixth Circuit failed to follow this Court's rulings in *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Hunter v. Erickson*, 393 U.S. 385 (1969). Like Issue 3, the Akron charter amendment at issue in *Hunter* was adopted by a majority of the city's voters, repealed existing discrimination protections, and required those in need of such laws to win a majority in another popular vote before any such measure could be implemented. The amendment was struck down because it unjustifiably imposed the higher burden for securing new discrimination laws on a small identifiable group:

> Only laws to end housing discrimination on "*race, color, religion, national origin, or ancestry*" must run [the amendment's] gauntlet... [The amendment] disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations ... [Government] may no more disadvantage *any particular group* by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group smaller representation than another of comparable size.

Id. at 390-91, 393 (emphasis added).



The Sixth Circuit improperly limited the *Hunter* holding to the racial context. *Hunter* actually supports a broader principle of equal political participation. A measure "enacted with the purpose of assisting one group in its struggle with its political opponents," rather than for a neutral purpose commands strict scrutiny. *Id.* (Harlan, J., concurring). In this regard *Hunter* is consistent with other decisions from this Court which recognize the need to protect equal access to all levels of representative government. *Reynolds v. Sims*, 377 U.S. 533 (1964) (Alabama ordered to reapportion statelegislature as system in place unfairly diluted votes of urban citizens); *Washington v. Seattle District No. 1*, 458 U.S. 457, 470 (1982) (anti-busing initiative invalid because it did not "allocate governmental power on the basis of any general principle").

These same neutral principles are reflected in *Gordon v. Lance*, 403 U.S. 1 (1971), in which this Court upheld a requirement that tax increases and bonded indebtedness be first approved by 60% of the voters. The supermajority requirement affected *all* persons seeking to raise taxes, and did not target any one group. Significantly, this Court distinguished *Hunter* noting that the Akron amendment did single out an independently identifiable group:

> The class singled out in *Hunter* was clear -- "those who would benefit from laws banning racial, religious, or ancestral discriminations." In contrast *we can discern no independently identifiable group or category that favors bonded indebtedness* over other forms of financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote.... We conclude that so long as such provisions do not discriminate against or authorize discrimination against *any identifiable class*

> they do not violate the Equal Protection Clause.

*Gordon*, 403 U.S. at 5, 7 (emphasis added). *Hunter* was, therefore, not explained in *Gordon* solely as a case drawing a racial classification and the Sixth Circuit was wrong to limit the reach of *Hunter* to legislation drawing racial distinctions.

The Sixth Circuit also erred in the application of *Hunter* to these facts because it viewed Issue 3 as impacting on an "unidentifiable and non-protected class of homosexuals and their allies". Pet. App. 18a. The Court, in a related passage explained that "homosexuals generally are not identifiable 'on sight'" and further stated that:

> [N]o law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual 'orientation' simply do not as such comprise an identifiable class.

Pet. App. 13a. No "visibility" test is consistent with this Court's ruling in *Hunter*. This Court must accept *certiorari* and prevent such reasoning from threatening the rights of petitioners as well as other minorities - e.g., divorced people, people with disabilities, older people, Jews - who are not always "visible." Indeed this Court has recognized that even race is not always visible and is not defined solely by appearance. *See St. Francis College v. Al-Khazraji*, 481 U.S. 5604, 610-613 & n.4 (1987).

Issue 3 is very similar to the Akron charter amendment struck down in *Hunter* because it restructures the local political process by taking only issues affecting a targeted class



of citizens - here, gay people -- out of the normal legislative process. This Court should accept *certiorari*, hear the case on its merits and cause Issue 3 to suffer the same fate as the Akron Charter Amendment and be struck down.

## III. RESTRICTING GAY POLITICAL ACCESS IS AN IMPROPER GOVERNMENTAL PURPOSE; ISSUE 3 HAS NO RATIONAL BASIS.

The rational basis test requires a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642 (1993). A measure based upon a an illegitimate purpose such as prejudice toward a targeted group should not survive rational basis scrutiny:

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

*Palmore v. Sidoti*, 466 U.S. 429, 431 (1984). Thus the presence of prejudice or other improper government purposes behind a classification does require an examination to determine if legitimate or illegitimate purposes actually support the measure. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-450 (1985). The District Court held that Issue 3 reflected an improper purpose -- private prejudice. The Court of Appeals ignored that finding and then failed to examine whether the proffered governmental interests were a subterfuge for that prejudice. In so doing the Court of Appeals erred.

The District Court found that Issue 3 "does not target specific issues or types of problems that affect all citizens...[r]ather, Issue 3 targets specific citizens based upon

who they are." Pet. App. 44a-45a. The court held that Issue 3 reflects "private prejudice":

> Issue 3...is an affirmative declaration that gays, lesbians and bisexuals are unworthy of protection, now and in the future. It is a declaration that discrimination against them is permissible and that if they suffer discrimination at the hands of the majority, it is from the majority itself that they must seek help.

Pet. App. 76a. These findings were first based upon the text of Issue 3 itself and were further confirmed by the District Court's review of the historical record concerning Issue 3's introduction and passage. Pet. App. at 28a n.4, 60a, n. 16, 73a, 74a, and 76a. In reaching these determinations the court heard testimony from 20 witness, including 13 experts, and reviewed over 600 exhibits. The District Court found that "unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals" pervaded the presentations made by those promoting Issue 3. Pet. App. at 40a, n.7. The District Court concluded that Issue 3 reflects no legitimate governmental purpose; rather it represents "a bare desire to harm a politically unpopular group." Pet. App. 75a.

Examining the governmental purposes offered by Respondents to justify Issue 3, the District Court found that even those purposes that were legitimate in themselves were nonetheless "too attenuated" to justify Issue 3 under the rational basis test or any other equal protection scrutiny. Pet. App. 74-76a. No rational basis explained why lesbians, gay men and bisexuals alone were singled out in Issue 3. Moreover, uncontroverted evidence demonstrated that some asserted "goals" were simply not met by Issue 3. Government regulation was not reduced and no money was saved by the measure. Pet. App. 70a. The other stated purposes were actually alternative ways of supporting the measure as a



collective expression of public "morality" - a purpose firmly rejected by the trial court which could discern no uniform expression of morality in the Cincinnati community. The trial court also made clear that an invocation of "morality" cannot be accepted if it is a surrogate for prejudice, negative attitudes or fear of an unpopular group. Pet. App. 74a-76a.

The invocation of morality by the Respondents in this case also represents an appeal to the majority voters to institutionalize their majority political power. Restricting political access solely to preserve political power is an improper purpose. In *Carrington v. Rash*, 380 U.S. 89 (1965) this Court rejected Texas' refusal to permit soldiers to vote in certain elections. Soldiers upset the status quo in elections near large army bases and the state wanted to adjust the balance of power by simply restricting their exercise of the franchise. This Court refused to permit the state to "fence out" soldiers in order to protect the status quo.

Similar forces are at work behind Issue 3. The author of Issue 3 admitted that the real goal behind the measure was to hinder the political power of lesbians, gay men and bisexuals:

> What we have done was eliminate the ability for a well-funded powerful minority to effectuate legislation benefiting itself.

J.A. 457. The founder of Respondent ERNSR concurred:

> Ninety percent of the problem was the fact that the homosexuals...took over City Council and that they were going to start pushing their agenda through their elected officials. To me it had more to do with who was being elected to office...

Jt. Exhib. at 43. Indeed the petition drive to put Issue 3 on the ballot was pursued by "Take Back Cincinnati," an organization appealing to voters to "take back" the city from "homosexuals." Pltf. Ex. 2, at 7-11. The trial court accurately noted that "[a]ll citizens [deserve] the right to try to obtain legislation on their behalf on an equal footing with others." Pet. App. 53a. Justice Rehnquist, writing in dissent in *Anderson v. Celebreeze*, 460 U.S. 780, 817 (1983) (citations omitted), similarly noted that,

> A court's job is to ensure that the state in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.

This restructuring of political access in Cincinnati for the purpose of empowering the majority at the expense of the gay and lesbian minority is an example of institutionalizing the tyranny of the majority against which James Madison warned in Federalist 10 and 51.

The Sixth Circuit gave no weight to any of the District Court's findings and declared that the entire matter was subject to a *de novo* review. The Sixth Circuit did note that the trial "generated extensive expert testimony reflecting the social, political, and economic standing of homosexuals throughout the nation and the homophobic discriminations that have been experienced by the individual plaintiffs and others." Pet. App. 6a. But the Sixth Circuit nonetheless refused to give any weight to the carefully crafted factual findings entered by the trial court. Labeling them "sociological judgments" and "ultimate facts", (Pet. App. 9a), the Court asserted that the *de novo* standard therefore applied. This Court has rejected such reasoning, especially in the context of equal protection. *See e.g. Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991) ("the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal") (citing cases). Under this



erroneous appellate standard, the Sixth Circuit went on to reverse every holding of the trial court while making very few references at all to the factual record.

Employing the "special rights" rhetoric of the anti-gay campaign to secure passage of Issue 3, the Sixth Circuit repeatedly labeled the protection from discrimination available to all persons regardless of their sexual orientation under the Human Rights Ordinance (HRO) as "special protection" for lesbians, gay men and bisexuals. See Pet. App. 10a, 14a, n.4, and 18a, n.8. The effect of Issue 3, according to the appellate court, was:

> to render futile the lobbying of Council for preferential enactments for homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority.

Pet. App. 17a. Of course Issue 3 also prevents the passage of protective legislation in response to documented harms as well as "preferential enactments." The Court viewed Issue 3 as applicable to a "narrow spectrum of substantive issues." Pet. App. 18a. In essence, the Sixth Circuit agreed that the effect of Issue 3 was to target "homosexuals" and eliminate their ability to secure legislation and policies through the City Council and through city officers. However, the Sixth Circuit failed to recognize the anti-gay prejudice embodied in the measure. *Id.*

Again using the rhetoric of the anti-gay political forces (e.g., "homosexual lifestyle"), the appeals court held that:

> [Issue 3] did not punish or prohibit any aspect of the homosexual lifestyle and indeed did not compel the deprivation of anything from any person by the use of government

> power because of his or her sexual orientation.

Pet. App. 14a, n.4. This holding is simply not true. First, there is no such thing as, nor evidence in the record to identify a "homosexual lifestyle." Second, there was abundant evidence that Issue 3 would use government power to deprive lesbian and gay citizens of important protections. For example, the record clearly reveals that violence and discrimination against gay men and lesbians has been rampant in Cincinnati as it is nationwide. Jt. App. at 895-908, 909-961, 962-971, 1313-1324, 1438- 1472; Pltf. Ex. 393, 394. Other communities have passed legislation to address the problem of violence directed at people because of their sexual orientation. *See Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993); COLUMBUS, OHIO, ch. 2325 (1989). Issue 3 prohibits city council from passing and city administrators from enforcing such laws and therefore imposes a significant deprivation on lesbian, gay and bisexual citizens because of their sexual orientation.

The Sixth Circuit, by ignoring the findings of private prejudice, failed to anchor its analysis "in the realities of the subject matter addressed by the legislation," *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2643 (1993), and improperly permitted Respondents to "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985) (recently reaffirmed in *Heller* at 2643); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973).

The Sixth Circuit completely failed to explain why it was rational to single out only lesbian, gay and bisexual citizens to serve the broad interests cited in support of the amendment.



For example, the court held that Issue 3 potentially "enhanced associational liberty" for those seeking to "disassociate themselves from homosexuals." *Id.* This rationale of hostility does not support the restrictions imposed by Issue 3 on the political rights of only this targeted group, which make it impossible for them and no others to obtain protection from documented harmful conduct. The Court also noted that Issue 3 returned the municipal policy regarding "homosexuality" to one of "neutrality." *Id.* With the passage of Issue 3, the existing city discrimination ordinances continued to protect heterosexuals but no longer protected lesbians, gay men and bisexuals. That is not a "neutral" policy. Pet. App. 44a, 73a.

The Court of Appeals additionally justified Issue 3 by citing potential reductions in "government regulation" and cost. Pet. App. 20a-21a. These conclusions erroneously ignore the findings of the District Court based on the unrebutted testimony of City enforcement officers and experts from other jurisdictions demonstrating that Issue 3 creates no decreased cost or regulatory savings. Pet. App. 70a-71a. More importantly, these conclusions fail to exlain why the measure singles out lesbians, gay men and bisexuals to serve these broad goals.

The Sixth Circuit further held that Issue 3 "augment[s]" the "personal autonomy" of those holding deep "religious convictions, and [convictions on] other profoundly personal and deeply fundamental moral issues". Pet. App. 20a. The Court noted that

> if the amendment is construed to reflect the majority's moral views respecting homosexuality, the Supreme Court has dictated such articulations to constitute a legitimate governmental interest.

Pet. App. 20a, n.10. The Sixth Circuit's reliance on this "morality" rationale represents a distortion and unwarranted extension of this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The question in *Hardwick* was whether the State of Georgia violated substantive due process by criminally prosecuting sodomy. The question in this case is whether restricting gay men, lesbians and bisexuals from political access violates their right to equal protection. Indeed, Ohio and Cincinnati do not have sodomy laws or other criminal laws remotely similar to those in *Hardwick*. That decision simply cannot be stretched to support the restriction on political rights at stake in Issue 3.

Issue 3 has no legitimate governmental purpose and is too attenuated to the few legitimate purposes that might be cited on its behalf. The Sixth Circuit's error in affirming the measure against the rational basis challenge is a dangerous precedent that could weaken the rights of many other minority groups who are not "obvious," but who heretofore have been granted equal protection of the laws.

The Sixth Circuit completely failed to address the District Court's central finding that Issue 3 legislates private prejudice. Further, the Court of Appeals failed to explain the rational basis for singling out lesbian, gay and bisexual people to serve the government interests cited in support of Issue 3. This Court should accept *certiorari* to demonstrate the proper analysis to be used in this context as well as the proper result. Issue 3 is unconstitutional and has no rational basis.



## CONCLUSION

This Court is facing important questions in the *Romer* case regarding the rights of equal political participation under the Equal Protection Clause. The parties in *Romer* have also briefed the rational basis issue. This case raises the same questions and provides the substantial benefit of rulings by lower courts under the rational basis standard for review. This petition for *certiorari* should therefore be granted, the decision of the Sixth Circuit reversed, and the trial court decision reinstated.

Respectfully submitted,

ALFRED COWGER
(Counsel of Record)
TIMOTHY J. DOWNING
Erieview Plaza
1301 East Ninth Street
Seventeenth Floor
Cleveland, Ohio 44114
(216) 523-6865
*Counsel for Amici Curiae*

September 11, 1995

(6)



No. 95-239

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,
*Petitioners,*

v.

CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## REPLY BRIEF FOR PETITIONERS

PATRICIA M. LOGUE
SUZANNE B. GOLDBERG
*Lambda Legal Defense and Education Fund, Inc.*
17 East Monroe Street, Suite 212
Chicago, Illinois 60603
(312) 759-8110

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

ALPHONSE A. GERHARDSTEIN
*Counsel of Record*
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

SCOTT T. GREENWOOD
*Cooperating Counsel for the American Civil Liberties Union of Ohio Foundation, Inc.*
441 Vine Street, Suite 2301
Cincinnati, Ohio 45202
(513) 684-0101

*Attorneys for Petitioners*

15 pp

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** PAGE





**Constitutional and Statutory Provisions**

## REPLY BRIEF FOR PETITIONERS

1. Two responses have been filed in this case,[1] which are quite different in approach. The only "opposition" brief denominated as such was filed by the City of Cincinnati. That brief, which devotes its entire attention to arguing the merits of the case, never addresses the question of whether the petition should be held pending the Court's resolution of *Romer v. Evans*, No. 94-1039. Since the first issue discussed by the City is the very same "fundamental constitutional right to participate equally in the political process" that is the central focus of the *Romer* case, the City's suggestion that the petition should be denied outright is manifestly incorrect.[2]

In contrast, although petitioners and ERNSR respondents disagree about many things, they do agree on one, which is most important for the Court's purposes here: that the petition in this case should not simply be denied, but should *at least* be held pending the Court's resolution of *Romer*. Indeed, there is no sound argument to the contrary.

2. The only real issue as to the proper disposition of the petition at this point, therefore, is whether the Court should hold this petition or go ahead and grant *certiorari* now on the questions presented by petitioners, including the second question, which is whether the category of unusual structural

---

[1] The briefs filed by the two sets of respondents will be identified, respectively, as "ERNSR Resp." (Equal Rights, Not Special Rights) and "City Opp." (City of Cincinnati).

[2] The City also devotes attention in its opposition to the issue of whether gay men, lesbians, and bisexuals constitute a "suspect class" or a "quasi-suspect class." This issue is not properly before the Court -- it was not raised by petitioners, no cross-petition has been filed, and, in any event, respondents prevailed below on this point and therefore have no grounds to raise it here.

measures that includes Issue 3 can survive rational basis review. Petitioners have noted already that this case affords an appropriate vehicle for resolving this issue, since it was fully addressed on the merits by both of the courts below. Although the rational basis question was briefed by the parties in *Romer* and is properly before the Court in that case, the issue was not reached by the Colorado Supreme Court. Thus the Court may find that this case will assist significantly in its resolution of the rational basis question.[3]

3. Leaving those matters aside, therefore, petitioners will devote the bulk of this reply to a number of disagreements with and possible misunderstandings that are raised by respondents' presentations. Petitioners believe this discussion will assist the Court in reaching a proper disposition of the petition in this case, regardless of whether the Court makes that determination before or after *Romer* is decided.

4. In the event that the Court holds the petition and decides in *Romer* that this category of unusual structural measures -- which includes Colorado's Amendment 2, Cincinnati's Issue 3, and the Akron city charter amendment struck down by the Court in *Hunter v. Erickson*, 393 U.S. 385 (1969) -- violates the Equal Protection Clause, ERNSR respondents attempt to sidestep the necessary consequence that Issue 3 would be invalidated. ERNSR Resp. 14-17. Their argument seems to be that Issue 3, unlike Amendment

[3] Petitioners recognize that one consideration here is that if respondents prevail on the fundamental rights issue in *Romer*, then disposition of the further question of rational basis review will be entirely obviated in both cases. This point is discussed further in Part 4, *infra*. If the Court does decide to hold this petition pending its decision in *Romer*, and if petitioners prevail in *Romer*, then the Court should grant review on the rational basis question in this case for the reasons set forth in Part 6, *infra*.



2, is not a statewide measure, but "affects only *local* communities." *Id.* at 16 (emphasis in original).

Petitioners believe that this argument is simply wrong. In addressing the question whether individual citizens have a fundamental right to participate in the political process on an equal basis with one another, no legitimate distinction can be drawn between state and local governments for purposes of the Federal Constitution. On the contrary, the powers exercised by municipal governments are universally those delegated or authorized in the text of state constitutions and state laws. *See, e.g.*, Ohio Const. art. XVIII (governing municipal corporations and authorizing municipal home rule). If it is unconstitutional for the State to take some action, it cannot be constitutional for a City, acting upon authority conferred by the State, to do the very same thing. Therefore, whether action is taken at the state or the local level, government "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393.

Moreover, the line of cases in which the Court has addressed this category of unusual structural measures demonstrates the same point. The landmark case in this line -- *Hunter* -- involved an Akron city charter amendment that clearly has been the model for this next generation of such measures, including Amendment 2 and Issue 3. Indeed, for all practical purposes, Issue 3 is virtually identical to the city charter amendment invalidated in *Hunter*, except that here a different group of citizens has been singled out and relegated to exercising only second-class political rights. The Court invalidated this same kind of structural measure in *Hunter* because it targeted and subordinated a specified group of citizens "by making it more difficult to enact legislation in its

behalf." *Hunter*, 393 U.S. at 393. As Justice Harlan restated the matter in his concurrence, this measure explicitly serves to "place special burdens" on the ability of a defined group of citizens "to achieve beneficial legislation," and therefore "is discriminatory on its face." *Id.* at 395 (Harlan, J., concurring).[4]

5. Respondents also mischaracterize petitioners' argument on the *Romer* issue in two important respects that must be addressed here. *First*, ERNSR respondents make the erroneous claim that petitioners' argument is designed to curtail the use of the initiative or referendum process, and to insist that most if not all legislative decisions must be made by elected representatives rather than by the electorate at large. The argument is thus portrayed as being directly incompatible with the historical principles of our democracy. ERNSR Resp. 11-14.

To the contrary, petitioners' argument reinforces those historical principles. The constitutional flaw with the category of unusual structural measures exemplified by Issue 3 is not that they are adopted through the mechanisms of direct democracy, but that they create first and second tiers of political access. Respondents would have it that as long

[4] ERNSR respondents place special reliance on *James v. Valtierra*, 402 U.S. 137 (1971), which they contend rested on a narrow reading of *Hunter*. Notably, however, they *do not even mention Gordon v. Lance*, 403 U.S. 1 (1971), decided six weeks after *James*, in which the Court clarified that it did not regard *Hunter* exclusively as a race-based, suspect classification case. In *Gordon*, which had nothing to do with racial classifications, the Court described the operative constitutional inquiry as whether the challenged measure disadvantages an "identifiable group" of citizens such that a defined "sector of the population may be said to have been 'fenced out' of the political process." *Id.* at 5.



as these punitive measures do not classify by race or prevent the counting of everyone's votes, they do not implicate the Federal Constitution in any way. The decisive riposte to this thrust was provided by Solicitor General Griswold in the United States' brief as *amicus curiae* in *Hunter*:

> The Equal Protection Clause forbids a state or municipality from arbitrarily excluding voters from the booth . . . , weighting their votes unequally . . . , and giving greater representation to one class of voters than to another . . . . The same principles which forbid these and other forms of imbalance in the electoral processes apply, *a fortiori*, when what is at stake is the end product to which these are preliminary and preparatory steps -- *i.e.*, the very enactment of legislation.

*Id.* at 15. Although these unusual structural measures have historically been effected by voter initiative, petitioners' argument does not turn on their method of adoption. In any event, the Court settled long ago that even actions taken by the people directly through the initiative process are invalid when they contradict the overarching provisions of the United States Constitution. *See, e.g., Hawke v. Smith*, 253 U.S. 221 (1920) (invalidating Ohio initiative proposal); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating voter-initiated state constitutional amendment); *Hunter, supra*.

*Second*, ERNSR respondents contend that Issue 3 is valid because state and local governments must remain "entirely free to repeal such civil rights protections." ERNSR Resp. 14. But the actual effect of Issue 3 -- which is to restructure the political process so that members of a targeted group of citizens must operate under a more burdensome set of political rules than all others -- is dramatically different from a mere repeal of specific legislation. The Court has clearly

and persistently held to this difference in distinguishing the *Hunter* line of cases. *See Crawford v. Board of Education of Los Angeles*, 458 U.S. 527, 538 (1982) ("In *Reitman* . . . and again in *Hunter* . . . we were careful to note that the laws under review *did more than* 'merely repeal' existing anti-discrimination legislation." (emphasis added)). By contrast to a simple attempt to repeal any existing laws, Issue 3 singles out a defined group of citizens that are then "fenced out" of the political process and disabled from participating on equal terms with other citizens in that process. *Gordon*, 403 U.S. at 5. As a result, the "right to discriminate" is enshrined as "one of the basic policies" of the City, which explicitly reduces the targeted group to a subordinate political caste. *Reitman*, 387 U.S. at 381.

Indeed, the Cincinnati City Council has now voted to repeal the provisions of the Human Rights Ordinance that had forbidden discrimination on the basis of sexual orientation. Municipal voters could have done that as well. What cannot be done, however, is to target members of a defined group of citizens and restructure the governmental and political processes so as to institutionalize their subordination.

6. Finally, respondents contend that the Court should not grant *certiorari* on the issue of rational basis review either before or after it decides the *Romer* case. Only a few of their points will be addressed here. As an initial matter, ERNSR respondents assert that the Colorado Supreme Court "found that Amendment 2 serves compelling (and therefore necessarily legitimate) governmental interests in protecting religious liberty and associational privacy." ERNSR Resp. 18 (citing *Evans v. Romer*, 882 P.2d 1335, 1342-44 (1994)). That is not correct. Although the Colorado Supreme Court did determine that these were legitimate interests, it never held that there was any rational connection between these interests and the selective classification of gay people



embodied in Amendment 2 and mirrored in Issue 3. Instead, that court held that such measures must be invalidated *precisely* because the appropriate link was lacking between the actual workings of these measures and the government interests that they are purported to advance.[5]

This is a critical piece of petitioners' argument. The issue here for purposes of rational basis review is *not* whether respondents have identified any government interests that, in the abstract, are legitimate or even compelling interests. The crucial issue instead is whether respondents have shown, or the Courts can find, that those asserted interests are rationally related to the limitations that Issue 3 imposes uniquely upon the political access of lesbian, gay and bisexual citizens in the City's political processes.[6]

Proper framing of this issue is extremely important also in light of the two most significant precedents on rational basis review that were emphasized in the petition. *See* Pet.

---

[5] In *Romer*, the Colorado Supreme Court found that fundamental constitutional rights were at stake, and therefore applied the searching test of whether the link between the challenged measure and the asserted government interests satisfied a requirement of "narrow tailoring." *See Romer*, 882 P.2d at 1342-44. The court did not decide whether such measures actually *rationally further* the same interests.

[6] Respondents also err in contending that Issue 3 can be justified as a collective expression of disapproval of "homosexual conduct." ERNSR Resp. 23; City Opp. 26-27. The text of the measure itself targets persons based on their sexual orientation. In addition, the District Court found as a fact that lesbian, gay and bisexual citizens constitute "an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic." App. 39a. The court below did not overturn this finding.

19-26 (discussing, *inter alia*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973)). Respondents' position that the ruling below is not inconsistent with any of the Court's prior decisions is rendered unpersuasive by the remarkable fact that neither set of respondents even discusses these two cases in the context of the rational basis question. Where, as here, a challenged measure reflects a "bare . . . desire to harm a politically unpopular group," *Moreno*, 413 U.S. at 534, it cannot stand under the Equal Protection Clause. Further, even absent such antipathy, the mere articulation of potentially legitimate government interests does not end the inquiry. Instead, a further examination must be made of whether the link between these asserted interests and any distinction actually drawn by the measure is not "so attenuated as to render the distinction arbitrary and irrational." *Cleburne*, 473 U.S. at 446. The court below misapplied this Court's precedents on rational basis review when it failed to undertake this essential examination.[7]

Rather than discussing these cases, ERNSR respondents press an irrelevant argument about the relationship of

---

[7] ERNSR respondents also maintain that the Court does not undertake to evaluate the subjective motivations of the proponents of a challenged law, and that the District Court could not and did not do so here. ERNSR Resp. 20-21. Once again, however, this discussion is beside the point. Issue 3 is "discriminatory on its face." *See Hunter*, 393 U.S. at 395 (Harlan, J., concurring). Further, the District Court held that the actual effect of Issue 3 is simply to give effect to "private biases." *Cleburne*, 473 U.S. at 448. This conclusion was properly informed by the court's examination of the "historical context and conditions existing prior to [the] enactment" of Issue 3. *See Reitman* at 373; Pet. App. 40a n.7.



"underinclusiveness" to rational basis review. ERNSR Resp. 22-23. Once again, however, that is simply not the argument petitioners make when they criticize the extreme generality of most of the government interests asserted by respondents. The argument instead is over whether Issue 3's singling out of lesbians, gay men and bisexuals *rationally furthers* those asserted government interests. Suppose, for example, the City of Cincinnati were to adopt a law allegedly designed to reduce government regulation and generate cost savings -- two of the very general interests put forward by respondents in this case -- by curtailing city services to Appalachian citizens. The central question posed for rational basis review would be *not* whether these interests are legitimate government interests, and *not* whether there is at least some putative connection between them and the law, but whether there is any "reason to infer antipathy" from the law's classification, which would show that it had an illegitimate purpose. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979), quoted in *FCC v. Beach Communications, Inc.*, ___ U.S. ___, ___, 113 S. Ct. 2096, 2101 (1993). If not, the second question -- also ignored by respondents -- is whether the law's particular restriction on Appalachian citizens rationally furthers those interests. In the same manner, the adoption of Issue 3 squarely prompts the question whether the structural subordination of only gay, lesbian, and bisexual citizens in the City's political processes, which is the clear and intended consequence of the measure, *rationally furthers* any legitimate government interest. "Underinclusiveness" is entirely irrelevant to that analysis.

Petitioners therefore agree with the District Court that Issue 3 gives effect to private prejudice and does not rationally further any legitimate government interest. This rational basis question is worthy of review even if the Court were to determine that unusual structural measures, such as Amendment 2 and Issue 3, do not infringe on a fundamental

right to participate in the political process on an equal basis with other citizens. A quarter-century ago, the Court faced the same kind of measure in *Hunter*. That city charter amendment, like this one, was specifically designed to "stack the deck" against certain defined groups in the political process. The Court's ringing rejection of that approach closed the door on attempts to structure political castes for a generation. Now the same kinds of pressures and responses have surged to the surface in our society, and the Court is again called to decide whether such extraordinary restructuring of the political process is compatible with individual rights protected by the Equal Protection Clause. Petitioners strongly urge the Court not to uphold such measures, and to examine and reject them under rational basis review in this case even if the Court does not reject them under the equal political participation argument that is at issue both here and in *Romer*.

## CONCLUSION

For these reasons, as well as those stated in the petition, a writ of *certiorari* should be granted here. In the alternative, this case should be held pending the Court's resolution of *Romer v. Evans*, No. 94-1039.



Respectfully submitted,

PATRICIA M. LOGUE
SUZANNE B. GOLDBERG
Lambda Legal Defense and Education Fund, Inc.
17 East Monroe, Suite 212
Chicago, Illinois 60603
(312) 759-8110

ALPHONSE A. GERHARDSTEIN
*Counsel of Record*
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

SCOTT T. GREENWOOD
Cooperating Counsel for the American Civil Liberties Union of Ohio Foundation, Inc.
441 Vine Street, Suite 2301
Cincinnati, Ohio 45202
(513) 684-0101

*Attorneys for Petitioners*

September 15, 1995

No. 95-239

IN THE

# Supreme Court Of The United States

October Term, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, AND H.O.M.E., INC.,
*Petitioners,*

v.

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., AND ALBERT MOORE,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## Supplemental Brief for Petitioners

PATRICIA M. LOGUE
SUZANNE B. GOLDBERG
Lambda Legal Defense and Education Fund, Inc.
17 East Monroe, Suite 212
Chicago, Illinois 60603
(312) 759-8110

ALPHONSE A. GERHARDSTEIN
*Counsel of Record*
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

SCOTT T. GREENWOOD
Cooperating Counsel for the American Civil Liberties Union of Ohio Foundation, Inc.
441 Vine Street, Suite 2301
Cincinnati, Ohio 45202
(513) 684-0101

*Attorneys for Petitioners*

4 pp

## SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief in support of the petition for *certiorari* in this case pursuant to Supreme Court Rule 15.8. Because the outcome of this case is squarely determined by this Court's decision in *Romer v. Evans*, No. 94-1039 (May 20, 1996), and nothing remains to be decided on the merits, petitioners suggest that the proper disposition of this petition is to grant *certiorari*, reverse the decision below and remand the case for further proceedings.

The questions presented in this case are the same as those presented in *Romer*. In *Romer*, the Court has now affirmed the judgment of the Colorado Supreme Court and definitively held that Amendment 2 violates the Equal Protection Clause. The *Romer* holding requires reversal of the ruling below because the Sixth Circuit rejected an identical challenge to Issue 3, the municipal charter amendment which mirrors Amendment 2 and was adopted by the voters in Cincinnati in 1993. Like Amendment 2, Issue 3 "make[s] a general pronouncement that gays and lesbians shall not have any particular protections from the law." Slip op. at 13.

In *Romer*, the Court has held that these measures do not "bear a rational relationship to a legitimate governmental purpose," slip op. at 13-14, because they "identif[y] persons by a single trait and then den[y] them protection across the board," *id.* at 11. Because of the sweeping nature of these measures, the court in *Romer* drew the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 13. This holding directly resolves the second question presented for review in this case: "Whether such a city charter amendment violates the Equal Protection Clause even under the Court's standard of rational basis review where it gives effect to private prejudice and does not rationally further any legitimate governmental interest?"

The *Romer* decision thus definitively resolves the dispute between the parties in this case. Here, after a trial, the District Court issued a permanent injunction against Issue 3 because it failed rational basis review. *See* Pet. App. 68-76a. The Sixth Circuit reversed, *id.* at 19a-21a, concluding that Issue 3

satisfied rational basis review. In *Romer*, the Court has now rejected the analysis that led to this holding below. Although the Court could simply grant *certiorari*, vacate the ruling below, and remand for further proceedings not inconsistent with *Romer*, there is no purpose to be served by a *vacatur* as there is nothing left for decision on the merits. The Court already has held that measures such as Issue 3 represent "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." Slip op. at 14.

One of the respondents has previously suggested that this case is distinguishable from *Romer* because Issue 3 is a local rather than statewide measure. ERNSR Resp. at 16. This argument is untenable in view of the Court's broad holding in *Romer* that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that *government and each of its parts* remain open on impartial terms to all who seek its assistance." Slip op. at 12 (emphasis added). *See also* Pet. Reply at 2-3. If it is unconstitutional for a state to implement a measure such as Amendment 2, it cannot be constitutional for a city, acting upon authority conferred by a state, *see, e.g.* Ohio Const. art. XVIII (municipal powers), to do the very same thing.



## CONCLUSION

Based on the Court's decision in *Romer v. Evans*, No. 94-1039 (May 20, 1996), petitioners request that the Court grant *certiorari*, reverse the decision below and remand the case for further proceedings. Alternatively, petitioners request that the Court grant *certiorari*, vacate the decision below, and remand the case for further proceedings not inconsistent with *Romer*.

Respectfully submitted,

PATRICIA M. LOGUE
SUZANNE B. GOLDBERG
Lambda Legal Defense and
Education Fund, Inc.
17 East Monroe, Suite 212
Chicago, Illinois 60603
(312) 759-8110

ALPHONSE A. GERHARDSTEIN
*Counsel of Record*
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

SCOTT T. GREENWOOD
Cooperating Counsel for the
American Civil Liberties Union
of Ohio Foundation, Inc.
441 Vine Street, Suite 2301
Cincinnati, Ohio 45202
(513) 684-0101

*Attorneys for Petitioners*

May 22, 1996

# SUPREME COURT OF THE UNITED STATES

## EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., ET AL. *v.* CITY OF CINCINNATI ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 95–239. Decided June 17, 1996

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Romer* v. *Evans,* 517 U. S. ___ (1996).

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

I dissent from the decision to remand this case in light of *Romer* v. *Evans,* 517 U. S. ___ (1996). *Romer* involved a state constitutional amendment prohibiting special protection for homosexuals. The consequence of its holding is that homosexuals in a city (or other electoral subunit) that *wishes* to accord them special protection cannot be compelled to achieve a state constitutional amendment in order to have the benefit of that democratic preference. The present case, by contrast, involves a determination by what appears to be the lowest electoral subunit that it does *not* wish to accord homosexuals special protection. It can make that determination effective, of course, only by instructing its departments and agencies to obey it—which is what the Cincinnati Charter Amendment does. Thus, the consequence of holding *this* provision unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals. Unelected heads of city departments and

agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are concerned, be permitted to do what they please. This is such an absurd proposition that *Romer*, which did not involve the issue, cannot possibly be thought to have embraced it.

I would deny certiorari in this case, or else set the case for argument to decide for ourselves the *ultra-Romer* issue that it presents.